No. 01-1231-CFX Title: Connecticut Department of Public Safety, et al., Petitioners
v.
John Doe, et al.

Docketed:
February 26, 2002 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Dec 14 2001	Application (01A475) to extend the time to file a petition for a writ of certiorari from January 17, 2002 to February 18, 2002, submitted to Justice Ginsburg.
	Jan 3 2002	Application (01A475) granted by Justice Ginsburg extending the time to file until February 18, 2002.
	Feb 19 2002	Petition for writ of certiorari filed. (Response due April 15, 2002)
	Mar 5 2002	Order extending time to file response to petition until April 15, 2002.
	Apr 15 2002	Brief amici curiae of District of Columbia, et al. filed.
	Apr 15 2002	Brief amicus curiae of United States filed.
	Apr 15 2002	Brief of respondents John Doe, et al. in opposition filed.
	Apr 30 2002	DISTRIBUTED for Conference of May 16, 2002
	May 3 2002	Reply brief of petitioners CT Dept. of Public Safety, et al. filed.
	May 20 2002	Petition GRANTED. SET FOR ARGUMENT November 13, 2002. **********
	Jun 11 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including July 19, 2002.
	Jul 18 2002	Brief amicus curiae of United States filed.
	Jul 18 2002	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jul 19 2002	Motion of Reporters Committee for Freedom of the Press for leave to file a brief as amicus curiae filed.
	Jul 19 2002	Joint appendix filed.
	Jul 19 2002	Brief of petitioners CT Dept. of Public Safety, et al. filed.
	Jul 19 2002	Brief amicus curiae of Center for Community Interest filed.
	Jul 19 2002	Brief amici curiae of National Governors Association, et al. filed.
	Jul 19 2002	Brief amici curiae of District of Columbia, et al. filed.
	Aug 6 2002	Order extending time to file respondents' brief on the merits to and including September 19, 2002.
	Sep 6 2002	Motion of Reporters Committee for Freedom of the Press for leave to file a brief as amicus curiae GRANTED.
	Sep 16 2002	Brief amicus curiae of Public Defender for State of New Jersey filed.
	Sep 18 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 19 2002	Brief of respondents John Doe, et al. filed.
	Sep 19 2002	Brief amici curiae of Public Defender Service for the District of Columbia, et al. filed.

No. 01-1231-CFX

Entry	Date	Proceedings and Orders
	Sep 19 2002	Brief amicus curiae of Association for the Treatment of Sexual Abusers filed.
	Sep 20 2002	Record filed.
	Sep 24 2002	CIRCULATED.
	Sep 24 2002	LODGING consisting of twenty sets of six PD declarations received from counsel for amicus PD of New Jersey and distributed.
	Oct 21 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 21 2002	Reply brief of petitioners Connecticut Department of Public Safety, et al. filed.
	Nov 13 2002	ARGUED.

Supreme Court, U.S.
FILED

No. 011231 FEB 19 2002

OFFICE OF THE CLERK

In The

Supreme Court Of The United States

October Term, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C., LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Did the Court of Appeals erroneously conclude, contrary to other courts of appeals and in a manner inconsistent with the Court's ruling in *Paul v. Davis*, that Connecticut's Sex Offender Registration Law implicates an offender's liberty interest by listing offenders in an undifferentiated Registry, and violates due process by failing to afford the offender a hearing regarding his "current dangerousness" before publishing true and accurate information about him and his conviction history?

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LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit the plaintiffs are listed as Samuel Poe and John Doe.

In both courts below, the defendants were the Department of Public Safety on behalf of Henry C. Lee, Commissioner of the Department of Public Safety, the Office of Adult Probation on behalf of Robert Bosco, Director, and John Armstrong, Commissioner of the Department of Correction.

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IN THE SUPREME COURT OF THE
UNITED STATES OCTOBER TERM, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, the Department of Public Safety on behalf of Henry C. Lee, Commissioner, and the Office of Adult Probation, on behalf of Robert Bosco, Director, and John Armstrong, Commissioner of Department of Correction, pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on October 19, 2001, is reported at *Doe v. Dept. Of Public Safety*, 271 F.3d 38 (2d Cir. 2001), and is printed in the appendix to this petition at (A-1).

The memorandum of decision of the United States District Court for the District of Connecticut, *Chatigny, J.*, dated March 31, 2001, is reported at 132 F.Supp.2d 57 (D.Conn. 2001), and is printed in the appendix to this petition at (A-41).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment or October 19, 2001. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Justice Ginsburg extended the time for filing this petition until February 18, 2002. This petition is therefore timely filed. Supreme Court Rule 13.1; 28 U.S.C. § 210i(c).

STATUTORY PROVISIONS INVOLVED

[REPRINTED IN APPENDIX]

STATEMENT OF THE CASE

As the Court of Appeals below recognized (A-4), each of the 50 states of the Nation, along with the District of Columbia, has enacted versions of what have become known generally as "Megan's Laws". Such laws require those convicted of certain sexual offenses to register with the State upon release into the community and provide for the disclosure of information gathered through this registry. In enacting these laws, States have responded to public demand for information about sex offenders living in or having access to communities, as well as to Congress' conditioning the provision of federal grant money on the enactment of laws that make registration information available to the public.

In coming into compliance with these federal mandates, states have grappled with a variety of policy questions about the types of information to collect, from which offenders to collect it, and the types and form of information to dispense to the public. Additionally, states have sought to strike the proper balance between dispensing truthful and accurate information and protecting the rights of offenders.

Thus, it is not an exaggeration to state that the constitutional question presented in this case will impact directly upon the Megan's Laws of 50 states, or upon the choices those states have in further refining existing Megan's Laws. Specifically, the Court of Appeals' decision below, if allowed to stand or if adopted in other circuits, will control and hamper a state's ability to deliver to the public truthful, accurate and important information about sexual offenders, and hamper the states' ability to comply with federal mandates.

The respondent-plaintiff, a convicted sex offender,[1] brought suit against the petitioners pursuant to 42 U.S.C. § 1983, claiming that Connecticut's sexual offender registration law, which allowed Internet and public access on request to Connecticut's Sexual Offender Registry (hereinafter "the Registry"), violates the Due Process Clause of the Fourteenth Amendment to, as well as the Ex Post Facto Clause of, the United States Constitution. Under Connecticut's statutory scheme, enacted in response to federal law,[2] the Connecticut State Police (hereinafter "CSP") are required to maintain this Registry, containing a list of all persons convicted of certain criminal sexual offenses and other crimes found by a court to have been committed for a sexual purpose.[3] Connecticut registrants are required to provide information such as their address and personal, identifying characteristics to the CSP for inclusion in Connecticut's Registry.

Under Connecticut's law, the sole criteria for inclusion in the Registry is a person's conviction history. Unlike some other states, Connecticut has eschewed the costly, cumbersome and inaccurate process of ranking sexual offenders by their likelihood to reoffend, and has

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1/ As the Court of Appeals noted, the caption to this case at all three levels has listed two pseudonyms for plaintiffs, but John Doe was and remains the sole plaintiff and appellee. (A-3).

2/ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, Title XVII, § 170101, 108 Stat. 2038 (1994), codified at 42 U.S.C. § 14071; 42 U.S.C. § 3756; 64 Fed. Reg. 572 (1999); (A-4, n.5).

3/ Connecticut's statutory scheme also requires the registration of persons found not guilty of enumerated offenses by reason of mental disease or defect. Conn. Gen. Stat. §§ 54-251(a), 54-252(a), 54-253(a), 54-254(a), 54-255(a), 54-256. The statutes treat both convictions and such findings similarly, so they are collectively referred to throughout this brief as "convictions."

refused to distinguish the level of information available with regard to any individual registrant based upon any such ranking.[4]

Prior to the District Court's injunction in this case, the Registry was available to the public online.[5] The online website of the Registry made available the names, conviction information, and available addresses of the registrants. Significantly, it also prominently and explicitly disclaimed that the state was making any representation or had made any determination with regard to the risk of reoffense or the dangerousness of any given registrant. Indeed, the Registry expressly noted that persons were included in the Registry solely by virtue of their criminal convictions, and stated:

> The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry and has made no determination that any individual in the Registry is currently dangerous.

(A-9).

4/ See, e.g., New Jersey system as described in *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (N.J. 1995); New York system as described in *Doe v. Pataki*, 3 F.Supp.2d 456, 471-72 (S.D.N.Y. 1998); Ohio system described in *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (Ohio S.C. 1998), *cert. denied sub. nom, Cook v. Ohio*, 525 U.S. 1182 (1999).

5/ Conn. Gen. Stat. § 54-258. Also pursuant to the statute, registry information was accessible to the public during normal business hours at the Department of Public Safety office and local information was available at all local police stations and troops. *Id.*

The parties brought cross-motions for summary judgment, and on March 31, 2001, the District Court, granted the respondent-plaintiff's motion, holding that Connecticut's law regarding public access to the Registry violates the Due Process Clause.[6/] Specifically, the District Court held that it was the "undifferentiated" nature of the Registry -- that is, Connecticut's choice **not** to engage in the controversial and inaccurate process of ranking the current dangerousness of sex offenders -- that, when the Registry was made publicly available, "implicitly" communicated that all registrants, including the plaintiff, were "currently dangerous" and likely to re-offend. (A-49, 51-53). The District Court made this determination despite the Registry's prominent disclaimer that the dangerousness and risk of the registrants had not been determined, and that the State was making no representation on that issue. The District Court reasoned that the "undifferentiated nature of the registry stigmatizes [plaintiff] by grouping [him] together with dangerous registrants." (A-42). The District Court discerned in the website and the undifferentiated Registry not only an inherent message of dangerousness, but one that was considered to be potentially false as to the plaintiff-respondent. The District Court also concluded that a registrant's "current dangerousness" is susceptible to being proved or disproved, and therefore, the respondent-plaintiff possessed a liberty interest and a due process right to a hearing on that issue. (A-57).

As a result of its conclusion that the plaintiff's right to procedural due process had been violated, the District Court enjoined the CSP from making Registry information available to the public in any form identifying convicted sex offenders as members of the State of Connecticut

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6/ The District Court granted summary judgment for the defendant-petitioners with regard to the Ex Post Facto claims raised by respondent-plaintiff. (A-42).

Registry. (A-67-69). The District Court did not, however, enjoin the registration requirement of Connecticut's Sex Offender Registration Law (hereinafter "SORL") itself. Convicted sex offenders are still required, under Connecticut law and consistent with the District Court's injunction, to register and provide identifying information to the Department of Public Safety. The State is prohibited, however, from disseminating the truthful and accurate information contained in the Registry. (A-67-69).

The parties both appealed to the United States Court of Appeals for the Second Circuit, which on October 19, 2001, affirmed the District Court's judgment on the Due Process claim, and declined to rule on the Ex Post Facto question the District Court had resolved in the State's favor.[7/] The Court of Appeals did not accept the District Court's reasoning that the Registry, by being available to the public, falsely implied that *all* registrants contained thereon are dangerous, but reasoned instead that the availability to the public of the sex offender registry information amounted to an "implicit" statement that not all, but some of the convicted sex offenders on the Registry, are currently dangerous. (A-17-18). Like the District Court, the Court of Appeals held that this implicit message of dangerousness, although expressly disclaimed on the website, coupled with the registration requirements, sufficed to bestow a liberty interest on registrants. Thus, the Court of Appeals held that a hearing was necessary before a registrant's conviction information could be made available to the public as part of the Registry kept in conformity with federal law. The Court of Appeals therefore affirmed the District Court's injunction prohibiting public access to the accurate and uncontested

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7/ This Court recently received a petition for certiorari (No. 01-729) on the same Ex Post Facto issue in *Otte v. Doe*, 259 F.3d 979 (9th Cir. 2001).

information maintained as a state record on Connecticut's Registry. The Court of Appeals, like the District Court, did not find the registration requirements to be unconstitutional, and did not enjoin the CSP from enforcing the registration requirements for convicted sex offenders within the State of Connecticut. (A-39).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision creates a clear split among the circuit courts of appeals on an issue significant to the Nation -- whether a law making available to the public a sex offender's accurate conviction and other information implicates a protected liberty interest. Further, the Court of Appeals' resolution of this issue is plainly contrary to this Court's well-established law regarding whether and to what extent a person has a constitutionally protected liberty interest in his reputation sufficient to invoke procedural due process protections. *See Paul v. Davis*, 424 U.S. 693 (1971); *Codd v. Velger*, 429 U.S. 624 (1977).

Beyond creating a circuit split and resolving a central constitutional question in a way that runs afoul of this Court's precedents, this case is of real and practical significance to the 50 state legislatures and the District of Columbia as they grapple with enacting and refining their versions of Megan's Law. Federal law requires that every state maintain a sex offender Registry, and further requires that every state provide a mechanism for making such Registry information available to the public. In ruling that a state may only make a sexual offender's Registry information available to the public if it undertakes the complicated, costly, and yet unreliable process of offender risk assessment, the decision below impacts, to varying degrees, all of the states' participation in the federal sexual offender registration program. The ruling of the Court of Appeals inappropriately eliminates the discretion afforded

to the states under federal law in that it forces states to undertake risk assessment of offenders as a prerequisite to making concededly accurate information about convicted sexual offenders publicly available.

I. THE COURT OF APPEALS' DECISION CREATES A SPLIT AMONG THE CIRCUITS ON AN ISSUE OF GREAT NATIONAL SIGNIFICANCE

A. The Circuit Split is Clear.

The Court of Appeals' opinion below accurately describes a split among both the circuit courts of appeals and the district courts that have considered whether states' sexual offender registration laws invoke a liberty interest sufficient to implicate procedural due process protections. (A-32-33); Supreme Court Rule 10(a). The Court of Appeals' decision contrasts with the decisions of other circuit courts that have held that no liberty interest adheres to a convicted sex offender seeking to preclude the public from learning that he or she is included in a state registry compiling names and information regarding similarly convicted persons or learning the information contained on the Registry. *See*, *Cutshall v. Sundquist*, 193 F.3d 466 (Tennessee's Law) (reversing the district court), *reh'g en banc denied*, 1999 U.S. App. LEXIS 31557 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000)[8]; *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied sub nom Stearns v. Gregoire*, 523 U.S. 1007 (1998).[9]

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[8] The Sixth Circuit ruled similarly as to Ohio's law. *Bruggeman v. Taft*, 2001 U.S.App. LEXIS 24164 (6th Cir. 2001), No. 01-3380, Oct. 31, 2001.

[9] *See also*, *Corbin v. Chitwood*, 145 F. Supp.2d 92 (D.Me. 2001); *Akella v. Mich. Dep't of State Police*, 67 F.Supp.2d 716 (E.D. Mich. 1999); (finding no liberty interest in Internet system

In *Cutshall, supra*, the plaintiff challenged Tennessee's SORL as violating his right to due process, arguing that both a liberty and a property interest were implicated. 193 F.3d at 478. The District Court agreed "that the provision of the Act allowing for public disclosure of registry information violated these rights, and concluded that Tennessee was required to provide Cutshall with appropriate procedural due process protections before releasing any registry information." *Id.* In reversing the District Court, and rejecting the claim of a liberty or property interest, the Sixth Circuit relied on *Paul v. Davis*, noting that the "Due Process Clause is implicated only when state conduct alters 'a right or status previously recognized by state law.'" *Id.* at 479, *citing Paul*, 424 U.S. at 711.

In *Russell v. Gregoire, supra*, the Ninth Circuit affirmed a District Court ruling that the State of Washington's SORL did not implicate any constitutionally protected interest sufficient to invoke the due process clause, and correctly noted that there is no "general constitutional right to privacy in information collected in a database." 124 F.3d at 1093-94. The Ninth Circuit held: "The information collected and disseminated by the

(E.D. Mich. 1999); (finding no liberty interest in Internet system very similar to Connecticut's, under *Paul v. Davis*). *Lanni v. Engler*, 994 F. Supp. 849 (E.D. Mich. 1998) (finding no liberty interest in compiling "truthful, public information and mak[ing] it more readily available" and finding a hearing to contest accurate information would serve no purpose. *Id.*); *Doe v. Kelly*, 961 F. Supp. 1105 (W.D. Mich. 1997); *cf John Doe #1 v. Williams*, 167 F. Supp.2d 45 (D.D.C 2001), (relying on District Court's decision in this case), *appeal pending*; *and cf, A.A. v. New Jersey*, 176 F. Supp.2d 274 (D.N.J. 2001) (regarding New Jersey's Internet Registry Act and existence of liberty interest as well as Ex Post Facto issue); *Doe v. Pataki*, 3 F. Supp.2d 456 (S.D.N.Y. 1998) (finding a liberty interest not only for persons assessed at middle or high level of risk, but in communication of accurate conviction information only for registrants prior to risk assessment. *Id.* at 466-67).

Washington statute is already fully available to the public and is not constitutionally protected . . . with the exception of the general vicinity of the offender's residence (which is published)." *Id.* at 1093. The Ninth Circuit pointed out that addresses are generally not considered "private." *Id.*

The holdings and reasoning of both *Cutshall* and *Russell* apply equally to this case. The Court of Appeals below, however, chose to depart from her sister circuits.

B. The Court of Appeals' Ruling Forces States to Choose Between a System of No Public Access to Registry Information or a Tiered System Involving Risk Assessment.

As the Court of Appeals noted, the States primarily enacted Megan's Laws in response to a series of federal laws conditioning funding on the states' providing for certain registration and information access regarding convicted sex offenders. (A-4 n.5); *see* 42 U.S.C. § 14071 (A-105); 42 U.S.C. § 3756 (A-116). Federal guidelines provide that states "*must* establish a conforming information release program that applies to offenders required to register on the basis of convictions occurring after the establishment" of the federal registration laws. 64 Fed. Reg. 572, 581 (1999) (emphasis added). The "principal objective of the information release programs will include means for members of the public to obtain information concerning registered offenders." *Id.*[10/]

10/ The federal guidelines further provide, "[I]nformation collected under a state registration program may be disclosed for any purpose permitted under the laws of the state. Therefore, there is no requirements [sic] under the [Wetterling] Act that registration information be treated as private or confidential to any greater extent than the state may wish." 64 Fed. Reg. 572, 581 (1999).

While federal law requires that states make available to the public their registry information, it provides the states with discretion as to how to accomplish this. *Id.* at 582. The federal law and guidelines generally contemplate two systems of disclosure. Under one type of system, a State conducts assessment hearings regarding registrants, classifying the offenders by level of risk.[11/] These systems often result in proactive public notification regarding offenders deemed to have an elevated level of risk of reoffending.[12/]

11/ *See, e.g., E.B. v. Verniero*, 119 F.3d 1077, *reh'g en banc denied*, 127 F.3d 298 (3d. Cir. 1997) (Three-tiered system of sexual offender classification in New Jersey); New York system as described in *Doe v. Pataki*, 3 F. Supp.2d 456, 471-72 (S.D.N.Y. 1998); Ohio system described in *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (Ohio S.C. 1998), *cert. denied sub. nom. Cook v. Ohio*, 525 U.S. 1182 (1999) (Ohio S.C. 1998).

12/ Once an elevated risk level is assigned, law enforcement and other agencies often take an active role in notifying persons who may encounter the registrant. *See, e.g., Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1244, *reh'g en banc denied*, (3d Cir. 1996) (law enforcement actively notifies members of public likely to encounter offender); *Roe v. Farwell*, 999 F. Supp. 174, 178-79 (D.Mass. 1998) (For Tier 2 and 3 offenders, the local police department required to actively notify community organizations of the existence of a sexual offender nearby. This active notification included utilization of non-governmental media, including "local cable television stations, local newspapers, or the public posting of information"); *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (Ohio S.C. 1998), *cert. denied sub. nom Cook v. Ohio*, 525 U.S. 1182 (1999) (Upholding constitutionality of act in which community notification includes "a statement that the offender has been adjudicated as being a sexual predator or a habitual sex offender").

It must be noted that some law enforcement agencies that do not engage in risk assessment hearings or provide any due process engage in active notification that far exceeds what the lower courts considered here to be stigmatizing. *See, e.g., Corbin v. Chitwood*, 145 F. Supp.2d 92 (D. Me. 2001) (District Court held no interest

Individualized sex offender risk assessment hearings are controversial, however, not only because they are costly, but because their results are inexact and, even among experts in the field, are not considered necessarily reliable. Connecticut's highest court has noted this lack of reliability, stating: "Partly because there are no psychological or physical signs or symptoms which can be reliably used to discriminate between the potentially dangerous and the harmless individual . . . predictions of future dangerousness are tentative at best and are frequently conceded, even within the profession, to be unreliable." *State v. Putnoki*, 200 Conn. 208, 219-20, 510 A.2d 1329 (1986) (Peters, C.J.) (citations and quotations omitted).

Federal law does not *require* States to adopt risk assessment mechanisms in undertaking public notification. 64 Fed. Reg. at 582. In fact, a number of states, including Connecticut, eschew a risk assessment system, opting instead for a passive, "information on request" system. According to one commentator, such "compulsory" registry systems without individualized risk assessments have been adopted in nineteen states. Wayne A. Logan, A Study in "Actuarial Justice: Sex Offender Classification Practice and Procedure", 3 Buff. Crim. L. Rev. 593, 603 (2000). This alternate information system, as implemented in Connecticut and other states, was described by the District Court as "undifferentiated". (A-42). These systems provide information regarding persons convicted of certain enumerated offenses to the public without attempting to determine or announcing a determination regarding the risk of re-offense.

The Court of Appeals' ruling in this case essentially eliminates a state's discretion to utilize an undifferentiated,

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sufficient to implicate due process in police department's utilization of fliers disclosing conviction record and utilization of the media for a public announcement regarding public safety threat of convicted offender).

"information-on-request" system, and mandates that states establish a system that provides every registrant a hearing to determine the risk of any given offender's re-offense (i.e. is the offender "currently dangerous?") with a corresponding tiered system of information accessibility, if not proactive notification.[13/] Tiered systems might require a full panoply of due process protections, such as the right to an appeal, an attorney, and/or an expert witness at State expense for indigent registrants.[14/] Not only is such a tiered system cumbersome and expensive, but it is intrinsically less accurate than a system in which there is no subjective information relayed, but only objectively true information. At the very least, the accuracy and reliability of such a system is the subject of great debate among scholars, practitioners and elected representatives.

The federal guidelines provide that an acceptable means of complying with the mandated registry information release requirement is to "make information

13/ The District Court was candid in its view that a tiered system is constitutionally mandated, stating: "In a tiered system, a recipient of a registrant's information can discern the dangerousness of that registrant relative to the universe of sex offenders. By omitting to provide such relative information, Connecticut's system has the effect of falsely suggesting that nondangerous registrants are in fact dangerous." (A-53). The District Court's logic assumes, based on thin air, that any tiered system can lead to an accurate "discern[ing of] ... dangerousness." *Id.*

14/ See, *e.g.*, *Doe v. Poritz*, 142 N.J. 1, 662A.2d 367, 382-83 (N.J. 1995) (New Jersey's tiered system, as distinguished from recently enacted Internet system, requires judicial review of administrative hearing, notice, right to counsel, state-provided counsel if indigent, discovery, burden of persuasion by clear and convincing evidence on the state, and the right to an appeal); *Doe v. Pataki*, 3 F.Supp.2d 456, 471-72 (S.D.N.Y. 1998) (requiring New York to provide right to counsel for classification hearings, at expense of state in event of indigent registrant, pre-hearing discovery, burden of proof on state by clear and convincing evidence, and right to an appeal).

accessible to members of the public on request." 64 Fed. Reg. at 582. The guidelines themselves distinguish between "information-on-request systems" and "proactive notification systems." *Id.*[15/] The guidelines make clear, in

15/ Regardless of whether states use a proactive notification system or an information on request system, more than half use or used the Internet to make available information about registered sex offenders. The following is a listing of each states' respective authorizing statutes and sex offender registry web site addresses: Alabama, Ala. Code § 15-20-25 (www.qsiweb.net); Alaska, Alaska Stat. § 18.65.087 (www.dps.state.ak.us); Arizona, Arizona Stat. § 13-3827 (www.azsexoffender.com); Colorado, Colo. Rev. Stat. Ann. § 18-3-412.5 (www.sor.state.co.us); Delaware, Del. Code. Ann. Tit. 11 § 4121 (www.state.de.us/dsp/sexoff); Florida, Fla. Stat. Ann. § 775.21 and § 943.043 (www.fdle.state.fl.us/Sexual Predators/); Georgia, Ga. Code Ann. § 42-1-12 (www.ganet.org/gbi); Hawaii, Haw. Rev. Stat. Ann. § 846E-2 et seq. (www.ehawaiigov.org/HI_SOR); Illinois, 730 Ill. Comp. Stat. Ann. 152/115 (www.isp.state.il.us); Indiana, Ind. Code § 5-2-12-11 (www.state.in.us.serv/cji_sor); Iowa, Iowa Code § 692A.13 (www.state.ia.us/government/dps/dci/isor/); Kansas, Kan. Stat. Ann. § 22-4909 (amended by 2001 Kan. Sess. Laws Ch. 208 to provide explicit authority for maintenance of a statewide Internet sex offender registry (www.ink.org/public/kbi/kbiregoffpage.html); Kentucky, Ky. Rev. Stat. Ann. § 17.510 (http://kspsor.state.ky.us/); Louisiana, La. Rev. Stat. Ann. § 15.540 et seq. (www.lasocpr.lsp.org/socpr/); Maryland, Md. Ann. Code art. 27, § 792 (www.dpscs.state.md.us/sor/); Michigan, Mich. Comp. Laws § 28.730 (www.mipsor.state.mi.us/); Minnesota, Minn. Stat. § 244.052 (www.doc.state.mn.us/level3/level3.asp); Mississippi, Miss. Code Ann. § 45-33-49 (www.sor.mdps.state.ms.us/); Montana, Mont. Code Ann. § 46-23-508 (http://svor.doj.state.mt.us); Nebraska, Neb. Rev. Stat. § 29-4001 et seq. (www.nsp.state.ne.us/sor/find.cfm); New Mexico, N.M. Stat. Ann. § 29.11A-5.1 (www.nmsexoffender.dps.state.nm.us/); New York, N.Y. Correct. Law § 168-q (www.criminaljustice.state.ny.us/nsor/); North Carolina, N.C. Gen. Stat. § 14-208.15 (www.sbi.jus.state.nc.us); South Carolina, S.C. Code Ann. § 23-3-490 (www.sled.state.sc.us); Tennessee Tenn.Code Ann. § 40-39-106 (www.ticic.state.tn.us); Texas, Texas Crim. P. Code Ann. § 62.01 et seq.

fact, that states "cannot comply by having purely permissive or discretionary authority for officials to release registration information." *Id.* at 581. Ironically, all that the lower courts' injunction currently allows is discretionary proactive notification by law enforcement. (A-67-69).

Moreover, to the extent a tiered system restricts public access to information regarding some registrants, it results not only in less accurate information being available, but in less information being available overall. The lower courts' rulings have the further ironic result of providing sex offenders with the constitutional right to keep secret otherwise public and accurate information, generally subject to freedom of information laws. In fact, the lower courts' logic leads to the bizarre result that for a state to release the objective and indisputably accurate information federal law directs states to disseminate, it must add to that information subjective and quite arguably inaccurate information by way of a risk assessment.

Thus, a ruling from the Court in this case would not only resolve a split of authority among the circuits on an important issue that this Court has not heretofore addressed, but would resolve the issue of the extent of any state's discretion in enacting legislation in conformity with the Wetterling Act and related federal law. [16/]

(http://records.txdps.state.tx.us/so search.cfm); Utah, Utah Code Ann. § 77-27-21.5 (www.corrections.utah.gov); Virginia, Va. Code Ann. § 19.2-390.1 (www.vsp.state.va.us); West Virginia, W. Va. Code § 15-12-5 (www.wvstatepolice.com/sexoff); Wyoming, Wyo. Stat. Ann. § 7-19-303 (http://attorneygeneral.state.wy.us/dci/).

16/ This case presents the issue in a clean manner, as Connecticut's system is wholly an "information on request" system, with no risk assessment being performed, and with offenders of certain enumerated offenses listed on the Registry, along with their conviction information but absent any stratification in terms of dangerousness, risk of reoffense, or seriousness of history. It is not a hybrid system. *See, e.g., AA. v. New Jersey*, 176 F. Supp.2d 274 (D.N.J. 2001) (describing dual

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *PAUL V. DAVIS* AND *CODD V. VELGER*

The Court of Appeals' conclusion that the public availability of the plaintiff's conviction and identifying information, undifferentiated from other sex offenders, implicates a liberty interest plainly "conflicts with relevant decisions of this Court."[17/] Supreme Court Rule 10(a).

Specifically, in *Paul v. Davis*, 424 U.S. 693 (1971), this Court held that no due process liberty interest could be assigned to a *suspected* shoplifter when police distributed his picture on a flier along with the phrase "Active Shoplifter." The Court made clear that one's "interest in reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Id.* at 712. Thus, a mere defamation action cannot comprise a Section 1983 action. State action that consists of merely publicizing defamatory information about an individual

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systems in New Jersey with a tiered risk systems and New Jersey's Internet Registry Act).

17/ While the Court of Appeals' ruling conflicts with this Court's clear holding in *Paul v. Davis* requiring "stigma plus" to implicate procedural due process, this Court has not had occasion to address this issue in the context of Sexual Offender Registration Laws, despite numerous lower court decisions grappling with various constitutional challenges resulting from the wave of such laws enacted during the 1990s. *See, e.g., Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *Paul P. v. Farmer*, 227 F.3d 98 (3d Cir. 2000); *Kirby v. Siegelman*, 195 F.3d 1285 (11th Cir. 1999) (per curiam); *Paul P. v. Verniero*, 170 F.3d 396 (3d Cir. 1999); *Artway v. New Jersey*, 81 F.3d 1235 (3d Cir.), *cert. denied*, 1996 U.S. LEXIS 950 (1996).

alone, apart from some more tangible interest such as employment, is neither "liberty" nor "property" sufficient to invoke due process protections. *Id.* at 701.

In *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam), this Court reversed the Second Circuit Court of Appeals and ruled that to allege a viable due process claim, a plaintiff must allege not only a statement that stigmatizes, but that stigmatizes falsely. *Id.* at 627-28. "If [a plaintiff] does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him." *Id.*

Paul and *Codd* both compel the conclusion that the "stigma plus" test is not satisfied in the case of a *convicted* sex offender whose picture and conviction information are made available upon request to the public. As Connecticut's Registry contains only concededly accurate and true information, the "implicit" finding by the Court notwithstanding, the respondent-plaintiff's due process claim fails the "stigma" portion of the "stigma plus" test. As importantly, there is no "plus" that flows from the Connecticut Registry sufficient to turn even the plaintiff's "implicit" defamation claim into a liberty interest of constitutional dimension.

A. The Court of Appeals Found "Stigma" In The Dissemination Of Only Accurate And Truthful Information.

In order to reach the conclusion that Connecticut's SORL violates due process, both the District Court and the Court of Appeals did not rely on the truthful and accurate nature of the information disseminated, which both courts conceded.[18/] (A-15). Rather, the lower courts creatively

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18/ Not only is the truth and accuracy of the information contained in Connecticut's Sexual Offender Registry not challenged, it is also information that is, in fact, publicly available pursuant to

resorted to the allegedly false "inference" that might be drawn from that information when the plaintiff's name and information is commingled with that of other sexual offenders: namely, that the plaintiff is "currently dangerous" and likely to reoffend. Under this Court's rulings, the far-fetched and speculative nature of this inference cannot form the basis even of the "stigma" prong of the test for determining a liberty interest. *Codd v. Velger, supra.*

This is so for at least two reasons. First, as mentioned before, Connecticut's Registry specifically and prominently disclaimed the inference the lower courts draw: that the Registry was intended to convey to the public that registrants are dangerous. The Court of Appeals, acknowledging this Statement, concluded that, at the very least, "publication of the Registry *implies* that each person listed is more likely than the average person to be currently dangerous." (A-18). This "implication" the lower courts attributes to the Registry is insufficient, in light of the disclaimer, to constitute a false statement. The lower courts' ruling turns the well-established law of defamation on its head if the publication of true and accurate information regarding persons convicted of crimes can be considered falsely stigmatizing when a recipient of the information might conclude that a convicted felon is more dangerous than "the average person". Indeed, even absent the disclaimer, making a true statement is a fortiori not equivalent to making a false statement.

Secondly, any "inference of dangerousness" comes, not from the Connecticut Registry's availability, structure or insufficient disclaimer, but, as the Court of Appeals itself has noted on a previous occasion, from the crimes the plaintiff has committed. *Doe v. Pataki*, 120 F.3d 1263, 1280, *cert. denied*, 522 U.S. 1122 (1998). ("The societal consequences that flow from a criminal conviction are unlimited"). The false and defamatory implication of "dangerousness" that the Court of Appeals determined to exist solely by means of inclusion in a Registry that specifically disclaims any such implication is, as a matter of law, insufficient to constitute a liberty interest.

Connecticut's state freedom of information laws. Conn. Gen. Stat. § 1-210(a).

Availability of the Registry simply made accurate information more easily accessible. Moreover, to the extent that the available information went beyond conviction information, (i.e., information "already" and still publicly available), it was information that only served to make that information more current and accurate (i.e., this is who the individual was that was convicted). Thus, the lower courts' rulings in this case interfere with the free flow of truthful information, under the guise of precluding a false impression of "dangerousness" in anonymous persons seeking truthful information.[19/]

The lower courts apparently believed that visitors to Connecticut's Registry would lack the sophistication to resist the allegedly false message of dangerousness they believed the Registry connoted. This constitutes a feeble basis for ruling that a liberty interest exists. Further, any risk of an inappropriate or inaccurate inference is more appropriately cured, from a policy and a constitutional perspective, not by eliminating the flow of true and accurate information, but, as this Court has held on numerous occasions in the First Amendment context, by circulating more, not less information in the market place.[20/]

19/ In this regard, a system that attempts to discern and label which convicted offenders are dangerous, not dangerous, or somewhere in between, arguably conveys less accurate information.

20/ "There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board, v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1975). Justice Brandeis stated eloquently, "If there be time to expose through discussion the falsehood and fallacies, to avert evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 273 U.S. 357, 377 (1927) (concurring opinion).

B. No Sufficient Plus Factor Exists.

This case is also worthy of this Court's review because of the Court of Appeals' misapplication of the plus element. The Court of Appeals stated: "Although we have applied the 'stigma plus' test many times . . . the import of the 'plus' component remains somewhat unclear." (A-20). Granting review in this case would provide this Court with a timely opportunity to reinforce the "stigma plus" requirements necessary to give rise to a liberty interest.

The courts below determined that the plaintiff had satisfied the "plus" element of the "stigma plus" test, holding that the "plus" element arose not from the "stigmatizing" statement, but from the mandates of Connecticut's law requiring that convicted sexual offenders register with DPS upon release, and provide current address information, fingerprints, a picture and other identifying information or be subject to a Class D felony. (A-7). *See* Conn. Gen. Stat. §§ 54-251(d), 54-252(d), 54-254(b). This holding itself constituted error under *Paul v. Davis*, by relying on legal requirements that exist independently of the allegedly stigmatizing acts of the defendants.

In *Paul*, the defendant police officials circulated fliers containing pictures of criminal shoplifting suspects, not convicted offenders such as the plaintiff-respondent, and containing words directly expressing a threat of further shoplifting activity by those persons identified in the flier, further identified as "Active Shoplifters". *Paul v. Davis*, 424 U.S. 693, 695 (1971). The *Paul* plaintiff faced outstanding criminal charges for shoplifting. *Id.* at 695-96. This Court held that, while the circulation of the flier was stigmatizing, there was nothing else in the factual elements presented to satisfy the "plus" prong of the test for determining the existence of a liberty interest, the "stigma plus" test. *Id.* at 711-712.

Certainly the charges pending against the plaintiff in *Paul* were necessary to his status as perceived by the police defendants as an "Active Shoplifter." *Id.* at 695-96. Those charges and the plaintiff's status as someone subject to the criminal process were not considered by this Court, however, to be sufficient to establish the "plus" requirement. The underlying criminal charges, while related to the plaintiff's inclusion in the flier, lacked a sufficient nexus to and were not the result of the stigmatizing behavior of publishing a flier about suspected criminals. *Id.* at 712.

The same is true of the underlying registration requirements the plaintiff is subject to under Connecticut's statutory scheme. While those requirements and the plaintiff's compliance therewith, to some extent, make it possible for the defendants to provide the most *updated* conviction information to the public via the Registry, the registration requirements are not *necessary* to the plaintiff's inclusion in the Registry. To the contrary, the District Court cited the statement published along with the the Registry that "This information is made available for the purpose of complying with Conn. Gen. Stat. § 54-250 et seq., which requires the Connecticut Department of Public Safety to establish and maintain a registry of persons *who are required to register*." (A-47-48).[21/] Persons not complying with the registration requirements were, and are still, listed on the Registry, along with their conviction information, obviously already available to the State

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21/ Despite the lack of a record or any finding supporting this statement, and in the face of the above finding by the District Court to the contrary, the Court of Appeals erroneously claimed, "The requirement that sexual . . . offenders register with the State --[is] a requirement that . . . is a necessary predicate for the stigmatizing publication of the registry". (A-34-35). Connecticut law in no way prohibits inclusion in the Registry of the names, conviction records and other information regarding registrants not in compliance with the registration requirements.

Police, and other registry information the State Police happen to have. The District Court did not enjoin this.

Thus, as in *Paul v. Davis*, the registration requirements, while related to the plaintiff's inclusion in the Registry, lack a sufficient nexus to and are not the result of the alleged "stigmatizing" behavior, and are therefore insufficient to constitute the "plus" element. Indeed, were the state to provide the requested relief in this case, a hearing, there would be no change to the registration requirements; there would likewise be no factual allegations to challenge. A proper application of *Paul v. Davis* by the Court of Appeals would therefore have produced a different result.

The egregiousness of the Court of Appeals willingness to find a "plus" element where none existed is exemplified in its statement that "we hold that a plaintiff establishes a 'plus' factor for purposes of the *Paul v. Davis* 'stigma plus' test only if he or she points to an indicium of material government involvement unique to government's public role that distinguishes his or her claim from a traditional state-law defamation suit." (A-31). This statement by the Court of Appeals runs contrary to the explicit ruling of this Court in *Paul v. Davis* holding untenable the "premise . . . that the infliction by a state officials of a "stigma" to one's reputation is somehow different in kind from infliction by a state official of harm to other interests . . . [T]he weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty." *Paul v. Davis*, 424 U.S. at 701. This Court made that ruling in *Paul* mindful of "the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts." *Id.*

The Court of Appeals' holding that the plaintiff had satisfied the "plus" element in the underlying registration requirements for sex offenders cannot be squared with other Supreme Court rulings regarding the necessary finding of a liberty interest. The Court in *Paul* reviewed previous rulings of this court regarding the facts necessary to a determination of a liberty interest. In each of those cases, as well as in *Paul*, the defamatory conduct was only sufficient if, "in the course of" the stigmatizing conduct, the additional burden was imposed. 424 U.S. at 710. This Court noted in *Paul* that in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), in which the defendant posted a list of *persons who by virtue of the posting*, were deprived of a previously existing right to purchase alcohol.[22/] 424 U.S. at 709. It was the "[p]osting [which] significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Id.* This is to be distinguished from the alleged "plus" in this case, the registration requirements, which the lower courts did not enjoin as part of the remedy for the due process violation, and which exist independently. The posting in *Constantineau* was a single act that simultaneously stigmatized and deprived the plaintiff of another right.

22/ No doubt the registrants in *Constantineau* were obliged to provide information to the State of Wisconsin in order to be included in the Registry of persons no longer allowed to purchase alcohol, yet those obligations were not considered tantamount to a "plus". Moreover, *Constantineau* is distinct from this case in that the posting of a list in that case had a direct result on the plaintiff's ability to enter into a transaction she was previously allowed to enter into. In this case, no one is required to access the Registry at all, and there is no rule that registrants are not allowed to be employed, to enter into agreements with regard to property, or the like.

In this case, the "plus" does not result from the same behavior as the "stigma"; the Registry exists whether or not it is published, or the Registry would have been shut down by the lower courts' injunction. The Registry still exists, as do the registration requirements; only the public's access to the Registry has been enjoined. (A-67-69).

The same is true of *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972) (requiring termination from state employment to occur "*in the course of*" defamation, and stating, "the range of interests protected by procedural due process is not infinite."), and *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, a school a student was simultaneously charged with misconduct and suspended from school. The Court held the plus element was satisfied in the suspension of a state right to education that had occurred simultaneously and as a result of the stigmatizing misconduct charges. *Id.* at 574-75.

The plus element in this case has no temporal nexus with the stigmatizing conduct of the public availability of information, and does not result from the stigmatizing conduct. The Court erroneously stated, contrary to the State law, that the Registry was dependent on compliance with registration requirements by the registrants. In fact, the Registry is only dependent on such compliance to maintain its accuracy--it maintains the list of names, convictions and other information regardless of the level of compliance.

The lower courts have, therefore, impermissibly, stretched the bounds of logic both in their "inference" of falsity in the provision of accurate information and in their derivation of the "plus" element from legal requirements that do not flow from the stigma. There is simply not a sufficient liberty interest adhering to registrants in Connecticut's laws allowing public access to its Registry such that public access to Connecticut's Registry can be enjoined.

CONCLUSION

This case presents a useful opportunity for this Court to instruct the states on how they might accommodate the constitutional rights of convicted sex offenders while complying with federal law in providing citizens with accurate and desired information already in the States' possession. The petitioners submit that Connecticut's statutory scheme is constitutionally acceptable, providing objective, accurate and true information already in the State's possession. Connecticut's Sex Offender Registry in no way implicates a liberty interest, as it neither falsely stigmatizes a registrant nor imposes on him a restraint sufficient to constitute the "plus" element of this Court's "stigma plus" test. The petitioners therefore urge this Court to consider this issue, which impacts the implementation of federal law as well as the law all 50 states either have or may enact pursuant to that law.

Respectfully submitted,
Petitioners

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No. _____

In The
Supreme Court Of The United States
October Term, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C., LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: July 12, 2001 Decided: October 19, 2001)

Docket Nos. 01-7561 (L); 01-7600 (XAP)

JOHN DOE, Individually and on behalf of other similarly situated,

Plaintiff-Appellee-Cross-Appellant,

SAMUEL POE, Individually and on behalf of others similarly situated,

Plaintiff-Appellee,

-v.-

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION,

On behalf of Robert Bosco Director, JOHN ARMSTRONG, Comm.,

Defendants-Appellants-Cross-Appellees.

Before: CALABRESI, POOLER, and SACK, *Circuit Judges*.

Appeal and cross-appeal from a judgment of the United States District Court of Connecticut (Robert N. Chatigny, *Judge*), inter alia, (i) granting summary judgment to the plaintiff on his claim under 42 U.S.C. § 1983 that Connecticut's sexual offender registration law violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and (ii) entering declaratory and permanent injunctive relief limiting public disclosure of information contained in the registry.

Affirmed

SHELLEY R. SADIN, Bridgeport, CT, (Zeldes, Needle & Cooper; Philip D. Tegeler, of counsel), *for Plaintiffs-Appellees-Cross-Appellant.*

RICHARD BLUMENTHAL, Attorney General, State of Connecticut, Hartford, CT (Gregory T. D'Auria, Henry Alexandre, Margaret Q. Chapple, of counsel), for Defendants-Appellants-Cross-Appellees.

SACK, *Circuit Judge*:

In this appeal, we address the constitutionality of Connecticut's version of "Megan's Law," Conn. Gen. Stat. §§ 54-250-261 (2001), amended by Conn. Legis. Serv. 01-84(West), which requires people convicted or found not guilty by reason of mental disease or defect[1/] of designated

[1/] Because the terms are always used together and carry the same consequences for registrants under the Connecticut sexual offender registry law, see, e.g., Conn. Gen. Stat. §§ 54-251(a), this opinion we use the term "conviction" to include a finding that a person is "not guilty" by reason of mental disease for defect."

crimes to register with the State, and mandates disclosure of the information contained in the registry to the public in printed form and through the State's Internet website. The United States District Court for the District of Connecticut (Robert N. Chatigny, Judge), in a thorough opinion, held that the law violates the plaintiff's[2/] right to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution but does not constitute an ex post facto law in violation of Article I, § 10 thereof. Doe v. Lee, 132 F.Supp. 2d 57 (D.Conn. 2001) ("Doe v. Lee"). In accordance with this ruling, the court entered declaratory and permanent injunctive relief prohibiting the State from disseminating the registry or disclosing registry information to the public except in limited circumstances. The defendants challenge the issuance of this injunction by appealing the underlying grant of summary judgment to the plaintiff on the due process claim. The plaintiff cross-appeals the court's entry of judgment in favor of the defendants on the ex post facto challenge.

We are keenly aware of the legitimate and pressing importance that the Connecticut legislature attaches to the State's ability to disseminate information about former sex offenders, principally in order to protect the health and welfare of the State's children. The particular legislative instrument it has chosen to employ, however, is too blunt properly to achieve that end. It fails to accommodate the constitutional rights of persons formerly convicted of a wide range of sexual offenses who are branded as likely to be currently dangerous offenders irrespective of whether or not they are. We therefore affirm.

[2/] Although the caption lists two pseudonymous plaintiffs bringing suit on their own behalf and the "behalf of others similarly situated," for the sake of relative simplicity, we treat John Doe as the sole plaintiff and appellee; he appears to be the sole cross-appellant.

BACKGROUND

I. The Connecticut Law

Like every other state,[3] Connecticut has enacted a version of "Megan's Law,"[4] which requires people convicted of certain criminal offenses, most of them sexual in nature, to register with the State upon their release into the community and provides for disclosure of information gathered through this registry.[5] As amended most recently in 1999, Connecticut's version of the law requires registration of people who have been convicted of crimes that fall within four statutorily defined categories: criminal offenses against a victim who is a minor,[6] nonviolent sexual offenses,[7] sexually violent offenses,[8] and felonies committed for a sexual purpose.[9] See Conn. Gen. Stat. §§ 54-250(2), (5), (11), (12), 54-251(a), 54-252(a), 54-254(a).[10]

3/ See Roe v. Farwell, 999 F.Supp. 174, 177 n.1 (D.Mass. 1998); Wayne A. Logan, Liberty Interest in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws, 89 J. Crim. Law & Criminology 1167, 1172 (1999).

4/ The original Megan's Law was enacted in New Jersey "to identify potential recidivists and alert the public when necessary for the public safety," Paul P. v. Farmer, 227 F.3d 98, 99 (3d Cir. 2000) (citation and internal quotation marks omitted), and was named in memory of seven-year-old New Jersey resident Megan Kanka, who in 1994 was sexually assaulted and murdered by a neighbor twice convicted of sexual offenses. See Id.; Doe v. Pataki, 120 F.3d 1263, 1265 n.1 (2d Cir. 1997); E.B. v. Verniero, 119 F.3d 1077, 1081 (3d Cir. 1997). As we explained in Roe v. Office of Adult Probation, 125 F.3d 47, 48 (2d Cir. 1997), and in Pataki, such laws were spurred by "[t]he seriousness of the harm that sex offenders' actions cause to society and the perception, supported by some date, that such offenders have a greater probability of recidivism that other offenders." Pataki, 120 F.3d at 1266.

5/ Federal law renders states that fail to enact such laws ineligible for ten percent of a formula grant that they would otherwise receive under the Edward Byrne Memorial State and Local Law Enforcement Assistance Program, codified at 42 U.S.C. § 3756. See 42 U.S.C. § 14071(g)(2)(A); Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 64 Fed. Reg. 572, 581-82 (Jan. 5, 1999). (Jacob Wetterling was an eleven-year-old St. Joseph, Minnesota, boy who was abducted by a masked man near his home in 1989 and has never been found. See United States v. Green, 983 F.2d 100, 100-01 (8th Cir. 1992); the Jacob Wetterling Foundation JWF Online, at http://www.jwf.org/jwf_about.html (last visited Aug. 23, 2001).) Connecticut's registration and notification system is compliant with, but not mandated by, the federal standards. See Final Guidelines, 64 Fed. Reg. at 581-82. The federal law is not challenged in this appeal

6/ "Criminal offense[s] against a victim who is a minor" are defined in Conn. Gen. Stat. § 54-250(2) to include kidnapping, unlawful restraints, and a wide variety of sexual acts against persons under the age of eighteen made criminal by various other specified Connecticut statutes.

7/ "Nonviolent sexual offense[s]" are defined in Conn. Gen. Stat. § 54-250(5) as violations of Conn. Gen. Stat. § 53a-73a, which renders a wide variety of sexual acts Class A misdemeanors

8/ "Sexually violent offenses" are defined in Conn. Gen. Stat. § 54-250(11) to include certain levels of sexual assault, and also kidnappings that the court finds were "committed with intent to sexually violate or abuse the victim." Id.

9/ The sentencing court determines whether a felony was committed for a sexual purpose. Upon such a finding, the sentencing court may require the offender to register as a sexual offender. See Conn. Gen. Stat. § 54-254(a).

10/ The law also covers any Connecticut resident who has been convicted in another jurisdiction of a

A. Registration

Registration requirements vary depending on the type of crime for which a particular person is convicted and thereby becomes subject to the registration law. A person convicted of a criminal offense against a minor or of a nonviolent sexual offense must register with the Connecticut Department of Public Safety ("DPS") for ten years beginning within three days following his or her release into the community.[11/] See id. § 54-251(a). In addition, a person convicted of a felony committed for a sexual purpose can also be required to register for ten years at the discretion of the sentencing court. See id. § 54-254(a). Finally, a person convicted of a sexually violent offense must register for the remainder of his or her life. See id. § 54-252(a).

Each registrant must provide the DPS with his or her name, "identifying factors" including fingerprints, a photograph, a list of other identifying characteristics, and a blood sample for DNA analysis, see id. § 54-250(3), criminal history record, and his or her residence address, see id. §§ 54-251(a), 54-252(a), 54-254(a), which must be verified once a year, see id. § 54-257(c). A person convicted of a sexually violent offense also must provide "documentation of any treatment received for mental abnormality or personality disorder," see id. § 54-252(a),

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crime "the essential elements of which are substantially the same as any of the crimes" within the statutory categories. See id. § 54-253(a).

11/ Groups of offenders within two categories must register for life: (i) anyone who has committed a criminal offense against a minor or a nonviolent sexual offense and has a prior conviction of the same type, and (ii) anyone convicted of the crime of sexual assault in the second degree for engaging in sexual intercourse with a victim who is under thirteen years old and more than two years younger that the perpetrator. See Conn. Gen. Stat. § 54-251(a).

and must verify his or her address once every ninety days, see id. § 54-257(c).

A person convicted of a sexually violent offense, by contrast, must register for the remainder of his or her life, see id. § 54-252(a), and, in addition to the standard name, address, criminal history, and "identifying factors" registration, must provide the State with "documentation of any treatment received for mental abnormality or personality disorder." Id. § 54-252(a). Such a person must verify his or her address once every ninety days. See id. § 54-257(c).

Certain additional obligations apply to all registrants regardless of their underlying conviction. Anyone subject to the law who moves to a new residence must inform the State of his or her current address within five days. See id. §§ 54-251(a), 54-252(a), 54-254(a). If a registrant regularly travels into or temporarily resides in another state, he or she must register with the responsible agency there and comply with whatever additional duties that state imposes on sex offenders.[12/] See id. Each registrant must abide by the statute's address verification requirements by completing and returning to the State within ten days of receipt a nonforwardable verification form. See id. § 54-257(c). Finally, anyone subject to the law must submit to having his or her photograph taken at a specified location whenever the State so requests, see id. §§ 54-251(a), 54-252(a), 54-254(a), at least once every five years, see id. § 54-257(d). Failure to comply with any of these duties constitutes a class D felony, punishable by up to five years in prison. See id. §§ 54-251(d), 54-252(d), 54-253(c), 54-254(b).

B. Disclosure and Public Notification

The statute also obligates DPS to compile the information gathered through the registration process in a central registry and to share that information with local police departments, state police troops, the Federal Bureau

12/ The law also imposes a reciprocal obligation on anyone who is registered and lives in another state but regularly travels into or temporarily resides in Connecticut. See. Conn. Gen. Stat. § 54-253(b).

of Investigation, and coordinate agencies in other states in which registrants reside. See id. § 54-257(a).

The DPS must also make the registry available to the public "during normal business hours." Id. § 54-258(a)(1). And the DPS is required to post registry information on the Internet, see id. § 54-258(a)(1), something it did until the practice was enjoined by the district court in this litigation. The DPS, also pursuant to statutory prescription, "[n]ot less than once per calendar quarter . . . [is required to] issue notices to all print and electronic media in the state regarding the availability and means of accessing the registry." Id. Local police departments and state police troops are required to make the registry available for public inspection during office hours. See id. The following warning must be posted wherever the registry is open to public view: "Any person who uses information in this registry to injury, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." Id. § 54-258a.

The primary means of disseminating registrant information to the public was the "Sex Offender Registry" Internet database maintained by the DPS,[13] which, until it was shut down pursuant to the injunction issued by the district court, could be reached through the websites of several television stations, as well as through the official homepage of the State of Connecticut, http://www.state.ct.us.[14] Anyone with access to the

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13 The statute does not itself give a name to the registry. The State refers to it, and referred to it on the Internet site, as the "Sex Offender Registry," although it includes persons convicted of several crimes "against a victim who is a minor" that are not necessarily sexual in nature. See Conn. Gen. Stat. § 54-251(a).

14 The website, which was first made available on January 1, 1999, was shut down on May 18, 2001 pursuant to the permanent injunction issued by the district court. During its first five months of operation, the website was visited more than three

Internet was able to search the database by zip code or town name, which produced a list of all registrants within the scope of the search, or by last name or first letter thereof. Every name that was produced through such a search yielded a direct link to another page entitled "Registered Sex Offender" containing the registrant's name, address, photograph, and physical description.

Sometime between December 1998 and May 1999, the following statement was added to the first page of the Sex Offender Registry website:

> This information is made available for the purpose of complying with Connecticut General Statutes § 54-250, et seq. . . . . The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this date on the Internet is to make the information more easily available and accessible, not to warn about any specific individual. Anyone who uses this information to injure, harass, or commit a criminal act against any person included in

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million times.

We are somewhat handicapped by our inability to view the website in its actual form or context because the site is no longer publicly available and neither party has supplied us with an alternative method for obtaining access to it.

the registry or any other person is subject to criminal prosecution.

For part or all of the time it was accessible, the website contained the message: "This information is made available for the purpose of protecting the public."

C. Exclusions and Restrictions

Certain people who would otherwise fall within the scope of the law are eligible for relief from these provisions. Two narrow categories of offenders need not register at all if a court so orders upon a finding that "registration is not required for public safety": anyone who was convicted of engaging, while under nineteen years of age, in sexual intercourse with a victim who was between thirteen and sixteen years old but at least two years younger than the perpetrator; and anyone who was convicted of subjecting another person to sexual contact without the victim's consent. See Conn. Gen. Stat. § 54-251(b), (c).

A court has discretion to order the DPS to restrict public dissemination of information about two other classes of registrants -- those who were convicted either of sexual assault in a spousal or cohabiting relationship or of any crime involving a victim under the age of 18 to whom the offender is related -- if the court finds that publication is not required for public safety and would reveal the identity of the victim. See id. § 540255(a), (b). A registrant who has committed one of several specified offenses between October 1, 1988 and June 30, 1999 may petition the court for an order limiting the dissemination of his or her registration information to law enforcement purposes, provided that the court finds that such a limitation would not threaten public safety. See id. § 54-255(c). This right of petition is also afforded to a person who had been convicted between October 1, 1988 and September 30, 1998 of a crime within the purview of the sex offender law provided that he or she did not serve jail time for the original conviction, has not subsequently been convicted of another crime covered by the law, and has registered within the DPS. See id.

Apart from whatever determinations are made in the course of these proceedings, neither the DPS nor any other agency responsible for administering the registration law affords a person subject to the law an opportunity to be heard on the issue of whether he or she is dangerous or a threat to public safety before requiring that person to register and disclosing the information about him or her to the public.

II. Parties

According to the plaintiff's Fourth Amended Complaint, the plaintiff is a Connecticut resident who has been convicted, based on conduct preceding the law's effective date, of an offense that subjects him to the registration and notification requirements of the Connecticut registration law. He alleges that he "is not a dangerous sexual offender and does not pose a threat . . . . To the community." Doe also represents a class certified by the district court on May 18, 2001 that is defined as "all persons who are subject to the registration and public disclosure requirements of Connecticut's sex offender registry act, Connecticut General Statutes §§ 54-250 et seq., without notice and an opportunity to be heard on the question whether they are dangerous."

The defendants are Connecticut agencies and directors or commissioners of those agencies with responsibilities for the administration of the registration act, all of whom are sued in their official capacities.

III. Procedural History

On February 22, 1999, the plaintiff filed suit under 42 U.S.C. § 1983 alleging that Connecticut's sex offender law violates his Fourteenth Amendment right to procedural due process because it deprives him of a liberty interest -- his reputation combined with the alteration of his status under state law -- without notice or a meaningful opportunity to be heard. He also claims that the law subjects him to punishment for conduct that preceded the date on which the law took effect in violation of the Constitution's Ex Post Facto Clause. See U.S. Const. Art.

I, § 10. The plaintiff also sought to represent two classes, one based on the due process challenge and the other on the ex post facto claim. On behalf of himself and both classes, Doe sought declaratory and injunctive relief prohibiting the State from enforcing the law's registration requirements or publicly disclosing any information contained in the registry.

The plaintiff moved for summary judgment on July 9, 1999. The defendants cross-moved for summary judgment two months later. The district court ruled on these motions on March 31, 2001, granting summary judgment to the plaintiff on the due process claim and to the defendants on the ex post facto challenge.[15] See Doe v. Lee, 132 F.Supp. 2d at 57.

With respect to the due process issue, the court held that the plaintiff had satisfied the "stigma plus" test derived from the Supreme Court's decision in Paul v. Davis, 424 U.S. 693 (1976), and had therefore stated a liberty interest protected by the Due process Clause. See Doe v. Lee, 132 F.Supp. 2d at 63-66. The court reasoned that the plaintiff had met the "stigma" portion of this test because "the registry suggested that plaintiff is currently dangerous," id. at 63, while he asserts that he is not. The court deemed the "plus" component satisfied by the fact that the registration duties imposed upon the plaintiff altered his status under state law. See id. at 64-66. Having thus found that the law deprived the plaintiff of a protected liberty interest, the district court held that the State had not satisfied the mandate of the Due Process Clause because it failed to afford the plaintiff any notice or opportunity to be heard on the issue of his current dangerousness before disclosing his registry information to the public. See id. at 66. On the ex post facto claim, the court held that the plaintiff had failed as a matter of law to demonstrate that the registration law was punitive either in purpose or in effect and therefore granted judgment to the defendants. See id. at 66-71.

15/ On the same day, the court granted the plaintiff's motion to amend his complaint to add an allegation that he is not dangerous, which the court deemed necessary to resolve the due process issue.

On April 18, 2001, the plaintiff filed motions for certification of the due process claim class, for a declaratory judgment, and either for preliminary and permanent injunctive relief on behalf of the class or, in the alternative, for a preliminary injunction in favor of himself. The court issued a permanent injunction on May 17, 2001, prohibiting the defendants from "disclosing or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class if the information identifies the class member as being included in the Registry" and from "identifying any member of the due process class as being included in the Registry." Doe v. Lee, No. 3:99-314 (D.Conn. May 17, 2001) (order granting permanent injunction). The injunction is limited to public disclosure of the sexual offender registry; it does not prevent law enforcement agencies or officers from obtaining access to the registry or using information it contains for the purposes of protecting the public or investigating specific crimes. On May 18, the district court granted the motion for class certification and entered a declaratory judgment in favor of the due process class.

The defendants immediately moved in the district court for a stay of the injunction, which the court denied on May 18, 2001. A divided panel of this Court denied a similar motion after oral argument on June 5, 2001, but expedited the parties' appeal and cross-appeal of the district court's final judgment, which had also been entered on May 18, 2001.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment de novo, constructing the evidence in the light most favorable to the non-moving party. See Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999), cert. denied, 529 U.S. 1098 (2000). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . The moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), i.e., "[w]here the record taken

as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

II. Procedural Due Process Claim

We first address the defendants' appeal from the district court's judgment with respect to the due process claim.

The parties agree, as do we, with the district court's conclusion that the "stigma plus" test, first set forth in Paul v. Davis, 424 U.S. 693 (1976), governs the defendants' appeal. In Paul, the Supreme Court held that in order to state a claim under 42 U.S.C. § 1983 for a violation of the Due Process Clause, a plaintiff who complains of governmental defamation must show (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement. See Paul, 424 U.S. at 701-02, 710-11. This requirement is known in this Circuit and elsewhere as the "stigma plus" test. See, e.g., Cannon v. City of West Palm Beach, 250 F.3d 1299, 1302 (11th Cir. 2001); Cutshall v. Sundquist, 193 F.3d 466, 479 (6th Cir. 1999); WMX Techs., Inc. v. Miller, 197 F.3d 367, 376 (9th Cir. 1999); Greenwood v. New York, 163 F.3d 119, 124 (2d Cir. 1998).

A. The "Stigma"

A "stigma" is "[a] mark or token of infamy, disgrace, or reproach . . . ." The American Heritage Dictionary of the English Language 1702 (4th ed. 2000). Publication of the Connecticut Sex Offender Registry plainly "stigmatizes" the people listed on it insofar as it

asserts that they are persons convicted of crimes characterized by the State as sexual offenses. But those assertions are concededly true. The gravamen of "stigma" as part of a due process violation is the making under color of law of a reputation-tarnishing statement[16] that is false. See Codd v. Velger, 429 U.S. 624, 627 (1977) (per curiam) (holding that plaintiff was not entitled to a hearing with respect to derogatory statements about him because "[n]owhere in his pleadings or elsewhere has [he] affirmatively asserted that the [statements in issue were] substantially false"); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 (2d Cir. 1980) ("[t]o constitute deprivation of a liberty interest, the stigmatizing information must be both false . . . and made public . . . by the offending governmental entity.") (alternations in original; citation and internal quotation marks omitted). The plaintiff therefore asserts not merely stigma, but false stigma: that the Connecticut law "violates [his] due process rights by stigmatizing [him] as [a] presently dangerous sex offender[]," which he maintains is false and gives him a right to a hearing comporting with due process requirements to provide him with an opportunity to prove that he is not in fact a present threat to public safety. Appellee's Br. at 7 (emphasis added); see also Doe v. Lee, 132 F.Supp. 2d at 63 ("Plaintiff contends that he is stigmatized because his inclusion in the registry conveys the false message that he is a dangerous sex offender and a threat to public safety.")

To meet the stigma element of his claim, then, the plaintiff is required to show a stigmatizing statement about him made or to be made under color of law that is capable of being proved true or false. He has only to allege, not prove, that the statement is false in order to establish a due process right to the hearing he seeks. See Brandt v. Bd. of Coop. Educ. Servs., 820 F.2d 41, 43 (2d Cir. 1987). It is at

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[16] Defamation and stigma are virtually synonymous. The "stigma plus" test is sometimes referred to in the case law a "defamation plus" test. See, e.g., Cannon, 250 F.3d at 1302; Herb Hallman Chevrolet, Inc. v. Nash-Holmes, 169 F.3d 636, 645 n.e. (9th Cir. 1999); Greenwood, 163 F.3d at 123, n.3.

such a hearing that the plaintiff would have the opportunity to have his name cleared and the false stigma thus avoided.

The district court concluded that the plaintiff met the stigma element of his claim. The court's opinion is not entirely clear, however, as to how public dissemination of the registry falsely stigmatizes the plaintiff. We read the court's decision as containing two possible explanations: that the registry implies that every person listed therein is in fact dangerous; and that it implies that some of the registrants are dangerous and that each individual registrant is more likely than the average person to be currently dangerous.

As to the first of these possibilities, the court, echoing the plaintiff's argument, stated:

> The stigma question . . . [is] whether, assuming plaintiff is not dangerous, public dissemination of the sex offender registry conveys the erroneous message that he is. The answer to this question must be yes. Despite the accuracy of the registry data concerning the plaintiff and the statement on the web site that no determination of any individual's dangerousness has been made, the registry suggests that plaintiff is currently dangerous.

Doe v. Lee, 132 F.Supp. 2d at 63. The defendants respond that "the inference of dangerousness the [d]istrict [c]ourt drew, and that it assumes the public will draw, from th[e] accurate and public information [contained in the registry] is not supported by any facts in the record." Appellants' Br. at 25. They argue that to the contrary, by including in the website version of the sexual offender registry the statement that the DPS has made no determination that the persons included are "currently dangerous," the State has specifically negated this inference. Id. at 25-26.

We share some of the State's doubt as to whether, as a matter of law, public dissemination of the registry implies to any particular reader, its average reader, or to "an

appreciable fraction" of its readership, Peck v. Tribune Co., 214 U.S. 185, 190 (1909 (Holmes, J.) (defamation action), that every listed person, including the plaintiff, is currently dangerous. The registry purports to be a list of virtually all offenders convicted of covered crimes, not only presently dangerous sex offenders. The website disclaimer enforces that notion, at least to those visitors to the website who actually read it, by implying that the site includes both dangerous and non-dangerous offenders. While the registry thus necessarily communicates the idea that registrants committed covered offenses and thereby implies that they may pose a current danger, we cannot conclude on the record before us that visitors to the website necessarily understood it to say or imply that all of the registrants are in fact currently dangerous. Our inability to reach that conclusion is enhanced by the fact that the website has been shut down and we have no means to examine the registry in the form and context in which actual readers would have viewed it.

But the district court also said:

> The stated purposes of the [law] are to protect the public and facilitate law enforcement. Registration and dissemination serve these goals only because some registrants are likely to reoffend. Thus, the message that some registrants are currently dangerous is, and is intended to be, communicated to viewers of the registry.

Doe v. Lee, 132 F.Supp. 2d at 64 (emphasis added) (footnote omitted). With this we agree. The sexual offender registry conveys the message that some of the persons listed on the registry are currently dangerous; disclosing the identity of persons who are currently a threat to public safety is the sole avowed and legitimate purpose of the registry. Even the disclaimer itself, by asserting that the DPS "has made no determination that any individual included in the Registry is currently dangerous," clearly implies that some may be. But the list is undifferentiated; it

does not say which registrants are or may be currently dangerous and which are not.

We think that it follows that publication of the registry implies that each person listed is more likely than the average person to be currently dangerous. That implication seems to us necessarily to flow from the State's choice of these particular individuals about whom to disseminate information, a record as to their sex offenses, and information as to their current whereabouts. This implication stigmatizes every person listed on the registry. And the plaintiff claims that, as to him, it is false.

If the "plus" factors are present -- a question to which we will turn shortly -- then the plaintiff is entitled to due process in the form of a hearing at which he would have the opportunity to establish that he is not currently dangerous and therefore should not be listed in a publicly disseminated registry in a way that falsely implies that he is particularly likely to be dangerous.

The State of Connecticut contends that by enjoining the publication of the information on the registry, the district court was doing no more than enjoining the dissemination of truthful information about the criminal history of the registrants. That would be troubling if it were so.[17/] We would be deeply concerned about a federal

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17/ The injunction by a court of statements like those contained in the sexual offender registry made by a private individual, a classic prior restraint, would be highly suspect particularly insofar as the statements in issue were true. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on first Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). They carry "a heavy presumption against [their] constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). But the parties have not addressed whether a similar analysis is to be engaged in where, as here, a federal court enjoins a state government or official from making statements some of which may be truthful.

court's order the purpose of which was to require the State of Connecticut to keep truths from its citizens. Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (deprecating as "highly paternalistic" a state law that, in violation of the First Amendment, sought to protect consumers by prohibiting truthful advertising). We conclude, however, that the district court's order does not target truthful speech. Publication of the registry in its present form implies that persons listed on the registry are particularly likely to be currently dangerous. Unless everyone on the registry is particularly likely to be dangerous, a proposition that the State neither asserts nor embraces, that implication is not true.

The listings alone, true or false -- the "stigmatizing" by the State -- are not, under Paul, actionable as due process violations. But if "plus" factors are present, the plaintiff is entitled to due process to establish whether the implication of likely dangerousness, as applied to him, is false and to prevent its communication to the public until he has had that opportunity and has failed.

B. The "Plus" Factors

Having isolated the "stigma" that the Connecticut sexual offender registry law visits on registrants, then, we must inquire whether there is a "plus" factor that gives rise to a liberty interest under the Due Process Clause.

1. Immunity and employment termination precedents.

Although we have applied the "stigma plus" test many times, see, e.g., Greenwood, 163 F.3d at 123-24; Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 630-33 (2d Cir. 1996), cert. denied, 519 U.S. 1150 (1997); Valmonte v. Bane, 18 F.3d 992, 998-1002 (2d

Cf. Reno v. Condon, 528 U.S. 141 (2000) (holding that federal statute that prohibited states from disseminating accurate motor vehicle information was not unconstitutional under the Commerce Clause or principles of federalism, without discussing First Amendment implications, if any

Cir. 1994); Martz v. Inc. Vill. Of Valley Stream, 22 F.3d 26, 31-32 (2d Cir. 1994); White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1062-63 (2d. Cir.), cert. denied, 510 U.S. 865 (1993); Easton v. Sundram, 947 F.2d 1011, 1016-17 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992); Neu v. Corcoran, 869 F.2d 662, 665-70 (2d. Cir.), cert. denied, 493 U.S. 816 (1989), the import of the "plus" component remains somewhat unclear. See Neu, 869 F.2d at 667 (noting that the meaning of Paul is "not unambiguous" and that "it is not entirely clear what the 'plus' is"). As we noted in Valmonte, 18 F.3d at 1000, this uncertainty arises in part because many of our cases involving "plus" factors were resolved on the basis of a qualified immunity defense. We often eluded the issue of whether the defendant had deprived the plaintiff of a liberty interest, concluding that the defendant was in any event entitled to prevail on grounds of qualified immunity because any such interest was not clearly established at the time of the alleged violation. See, e.g., White Plains Towing Corp., 991 F.2d at 1063-64; Easton, 947 F.2d at 1015-16; Neu, 869 F.2d at 665, 667.[18]

In addition, our cases have typically addressed "stigma plus" claims in the context of termination of government employment. See, e.g., Greenwood, 163 F.3d at 123-24; Donato, 96 F.3d at 630-33; Martz, 22 F.3d at 32; Brandt, 820 F.2d at 45; Baden v. Koch, 799 F.2d 825, 831 (2d Cir. 1986); Quinn, 613, 613 F.2d at 445-47; Gentile v. Wallen, 562 F.2d 193, 197-98 (2d Cir. 1977); Huntley v. Cmty. Sch. Bd., 543 F.2d 979, 985-86 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977). These cases yield principles that are sometimes difficult to apply in delineating "plus" factors in other contexts. This appears to result at least in part from the fact that the government-employment line of

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18/ We note that these cases were decided before the Supreme Court first "expressed its preference that courts address first the merits of the constitutional claims presented before turning to an analysis of qualified immunity." Medeiros v. O'Connell, 150 F.3d 164, 169 (2d Cir. 1998) (citing County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998)).

cases harks back to the Court's pre-Paul decision in Board of Regents v. Roth, 408 U.S. 564 (1972). There, the Court observed that although a teacher's termination from public employment does not implicate a liberty interest, it might if the state were to impose "on [the plaintiff] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." Id. at 573. In termination cases, court have found based on Roth, that it is the termination that is the "plus" factor establishing a due process violation and the right to a "name-clearing hearing." See, e.g., Donato, 96 F.3d at 630-31. In the case before us, there is no termination of government employment. We therefore look for an understanding of the meaning and function of the "plus" factors by reviewing the history, language, and apparent meaning of Paul and its progeny.

2. "Stigma plus" from Constantineau to Paul. Prior to Paul, the concept of "liberty" in the Due Process clause of the Fourteenth Amendment appears to have been widely understood to encompass a person's interest in his or her good name and reputation, without more. See Laurence H. Tribe, American Constitutional Law § 10-9 (2d ed. 1988). That principle seemed to be established by the Supreme Court's decision in Wisconsin v. Constantineau, 400 U.S. 433 (1971). At issue there was a Wisconsin statute that allowed local officials to post in liquor stores a list of persons who became dangerous after heavy drinking and to forbid persons on the list from purchasing alcohol for one year. The officials were not required to notify targeted persons or allow them to be heard on the issue of whether they deserved to "badge of infamy" that the list imposed upon them. Id. at 437. The Court invalidated the statute, stating that '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. at the heart of the Court's reasoning was the recognition that inclusion on the posted list

> may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the [statute], a resident . . . is not

> afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

Id. Chief Justice Burger and Justice Blackmun dissented on procedural grounds but agreed with the majority that "the Wisconsin statute appears, on its fact and in its application, to be in conflict with accepted concepts of due process," and that the Court's decision on the merits therefore "[v]ery likely . . . reach[es] a correct result." Id. at 440 (Burger, C.J., dissenting).

The Supreme Court seemed to reaffirm these "accepted concepts" in two cases decided over the ensuing several years. In Roth, the Court declined to find a protected liberty interest in the termination of a non-tenured teacher's employment at a public university but suggested that such an interest would be implicated if the state imposed "on [the plaintiff] a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Roth, 408 U.S. at 573. Citing Constantineau, the Roth Court observed that the state "did not make any charge against [the plaintiff] that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so," the Court reasoned, "this would be a different case." Id. As we have noted, this comment in Roth became the principal foundation for the jurisprudence of due process claims in connection with defamation (or "stigma") associated with termination of public employment.

Three years later, in Goss v. Lopez, 419 U.S. 565 (175), the Court held that students were entitled to due process before being suspended from public school on charges of misconduct. In addition to recognizing a property interest in the students' "legitimate entitlement to a public education," the Court appeared to conclude that the students had an independent liberty interest in their

reputations. Id. at 574. Again citing Constantineau, the Court reasoned that the school's charges of misconduct "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." Id. at 575. "[T]he claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution." Id.

In its 1976 decision in Paul v. Davis, the Court revisited the issue of government-imposed stigma and reoriented this precedent. The Court addressed a municipal police department's practice of circulating to local merchants flyers displaying photographs of persons deemed to be "active shoplifters." See Paul, 424 U.S. at 695. One such suspected shoplifter filed suit under 42 U.S.C. § 1983, alleging that under Constantineau the distribution of a flyer containing his photograph violated the Due Process Clause because it damaged his reputation without affording him the necessary procedural protection. See id. at 696-97.

Writing for the majority, then-Justice Rehnquist rejected this claim declaring that contrary to the plaintiff's view of Constantineau, an individual's "interest in reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." Paul, 424 U.S. at 712. The Court acknowledge that it had "in a number of . . . prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts." Id. at 701. But in each such case, the Paul Court reasoned, a liberty interest was implicated only because the state had not only stigmatized the plaintiff, but had also impaired or altered some other "more tangible interest[]," such as "a right or status previously recognized by state law." Id. at 701, 711. Thus, the Court observed, the deprivation in Constantineau was stigma plus the loss of the right, previously recognized under state law, to purchase alcohol; in Roth, the Court would have found a liberty interest implicated by stigma only if it was combined with termination of government employment; and in Goss, "liberty" was involved only

because there was stigma plus the extinguishment of the state-law right to public education.

Undergirding this analysis was the concern that a construction of the Due Process Clause under which damage to reputation alone could implicate a liberty interest "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." Id. at 699. The Court noted that the plaintiff's complaint "would appear to state a classical claim for defamation actionable in the courts of virtually every State," and that "if the same allegations had been made about [the plaintiff] by a private individual,' he would have nothing more than a claim for defamation under state law." Id. at 697, 698. Only on the basis of the fortuity that a state actor rather than a private party had made the defamatory comment could the plaintiff argue that his suit was "transmuted into one for deprivation . . . of right secured under the Fourteenth Amendment. "Id. at 697-98. Allowing that fortuity alone to establish a constitutional claim, the Court reasoned, would in effect render § 1983 "a font of tort law to be superimposed upon whatever systems may already be administered by the States." Id. at 701.

Paul's interpretation of decisions like Constantineau, Roth, and Goss was thus driven at least in part by "evident concern for values of federalism," Laurence H. Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065, 1101 n. 135 (1977), and more specifically by a resolve to prevent § 1983 from "supplant[ing] traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society," Daniels v. Williams, 474 U.S. 327, 332 (1986). The Court sought, through Paul, to maintain "the delicate balance between state and federal courts and [to respect] the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by the common law and the laws of the States, as well as by the Constitution." Albright v. Oliver,

510 U.S. 266, 284 (1994) (Kennedy, J., concurring in the judgment).

The requirement that a plaintiff demonstrate some "plus" factor -- an alteration or impairment of "a right or status previously recognized by state law," Paul, 424 U.S. at 711 -- appears to be central to this effort. If, as some thought before Paul, the Fourteenth Amendment notion of "liberty" encompassed an individual's unadorned interest in his or her reputation, then the issue whether an allegation of "stigma" stated a federal constitutional or state-law claim would depend entirely on whether the defendant happened to be a state officer or a private citizen. A plaintiff who was defamed by a private defendant could sue only in state court on a state law claim; a plaintiff who was defamed by a government actor could sue in federal court on a federal claim. Such a regime would "trivialize the centuries-old principle of due process" by enlarging the scope of the Fourteenth Amendment beyond the type of "arbitrary exercise of the powers of government" against which that provision was intended to guard, Daniels, 474 U.S. at 332, 331 (internal quotation marks omitted), while, at the same time, invading the domain of the states by permitting a plaintiff to bypass common-law tort regimes in favor of the "heavy artillery of constitutional litigation," Steuart v. Suskie, 867 F.2d 1148, 1150 (8th Cir. 1989).

The "plus" requirement avoids this result by ensuring that a plaintiff cannot allege as a deprivation of a constitutionally protected liberty interest an injury that could have been inflicted by a private citizen in a position analogous to the state actor. If the plaintiff can point to some material indicium of government involvement beyond the mere presence of a state defendant to distinguish his or her grievance from the garden-variety defamation claim, courts can be assured that § 1983 will not become "a body of general federal tort law" duplicative of "whatever systems may already be administered by the States." Paul, 424 U.S. at 701.[19]

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[19] The Connecticut law considered on this appeal provides broad immunity from civil suit for persons and entities involved in the maintenance and

Two sources lead further support to this understanding of the "plus" requirement. The first is Siegert v. Gilley, 500 U.S. 226 (1991), the only Supreme Court decision to apply and elaborate on the meaning of Paul. In an opinion by Chief Justice Rehnquist, the Siegert Court held that the plaintiff, a clinical psychologist who had voluntarily resigned from his post at one government hospital and was seeking to be "credentialed" at another, had not established a liberty interest arising from an allegedly defamatory letter written by his former supervisor to a prospective government employer. See Siegert, 500 U.S. at 227-29. The Court explained:

> The statements contained in the letter would undoubtedly damage the reputation of one in [the plaintiff's] position, and impair his future employment prospects. But the plaintiff in Paul v. Davis similarly alleged serious impairment of his future employment opportunities as well as other harm. Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort but it is not recoverable in a [constitutional] action.

Id. at 234.

The Court did not suggest that the requisite tangible interest or burden needs to meet some threshold of substantiality or that it must implicate a certain kind of interest, but rather that it must at least entail some non-trivial state involvement hat removes the plaintiff's

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dissemination of the registry. See Conn. Gen. Stat. § 54-258(b). The provision of a remedy through § 1983 therefore would not overlap with any remedy provided by the State but rather interfere with the power of the State to establish that there shall be no remedy in specific circumstances

complaint from the realm of traditional state-law defamation. Although "defamation, by itself, is a tort actionable under the law of most States, but not a constitutional deprivation," id. at 233 (emphasis added), an allegation of defamation brigaded with other government action adversely affecting the plaintiff's interests properly invokes the protections of the Due Process Clause and therefore states a claim under § 1983.

The second source of support for our reading of the "plus" component is the Supreme Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), overruled in part on other grounds by Daniels, 474 U.S. at 330-31. In Parratt, the Court held that where through a state official's misconduct, a plaintiff is stripped of property in circumstances in which pre-deprivation process is not feasible and the post-deprivation remedy provided by the state is adequate, the plaintiff may not bring a § 1983 action for violation of his or her procedural due process rights. See Parratt, 451 U.S. at 541-44. In such circumstances, the Court held, the state post-deprivation remedy provides all the process that is due.

The rationale underlying Parratt parallels that of Paul: "To accept [plaintiff's] argument that the conduct of the state official in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." Id. at 544. Indeed, Parratt quoted Paul for the proposition that permitting constitutional suits on the basis of random and unauthorized actions by state officials when post-deprivation remedies are adequate "'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" Id. (quoting Paul, 424 U.S. at 701).

The Supreme Court has since suggested a relationship between the Paul and Parratt analysis, see Daniels, 474 U.S. at 332-33, and courts cite the two for the proposition that "the Due Process Clause of the Fourteenth

Amendment . . . Does not transform every tort committed by a state actor into a constitutional violation." Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989); see also, e.g., Mahoney v. Kesery, 976 F.2d 1054, 1060 (7th Cir. 1992) (citing Paul and Parratt for the assertion that "[t]he Supreme Court has been emphatic that not every tort committed by public officers is actionable under the Constitution, even though every one could be thought to deprive the tort's victim of an interest in the nature of liberty or property"). We therefore look to our interpretation of Parratt as a proper source of guidance on the import of Paul.

In McClary v. O'Hare, 786 F.2d 83 (2d Cir. 1986), we held that Parratt does not apply to substantive due process claims because substantive due process violations are "'complete as soon as the prohibited action is taken'" and therefore do not depend upon the adequacy of any pre- or post-deprivation remedies. McClary, 786 F.2d at 86 n.3 (quoting Daniels, 474 U.S. at 338 (Stevens, J., concurring in the judgment)). But this conclusion could effectively swallow the Parratt rule, at least in those cases -- such as McClary itself, where the plaintiff's decedent lost his life -- in which a plaintiff whose procedural due process suit would be barred by Parratt could instead plead the claim as one for a violation of substantive due process. See Id. at 88-89; see also Albright, 510 U.S. at 285 (Kennedy, J., concurring in the judgment) (observing that Parratt could be avoided by "attaching a substantive rather than procedural label to due process claims"). This would thwart the purpose of Parratt by permitting federal constitutional claims to proceed on the basis of conduct that the Court has deemed insufficient when farmed in procedural terms.

Our analysis in McClary parallels a federalism- based interpretation of the Paul "plus" factors. We were presented in McClary with both substantive and procedural due process claims against state and county officials brought by the administratrix of the estate of a highway worker who was killed by a falling crane while working on a government project. 786 F.2d at 84-85. We first rejected the procedural due process claim on the basis, inter alia, of Parratt, id. at 86-88, and then turned to "[t]he more difficult question . . . [at] the heart of this case": "when a deprivation

of life or liberty assumes constitutional dimensions" for purposes of substantive due process. Id. at 88.

We began our discussion by observing that the Due Process Clause was designed to guard against abuses of "governmental power." Id. (citation and internal quotation marks omitted). We then noted that, as was the case in Daniels, no such abuse of state authority had been alleged; "the only fact distinguishing [the plaintiff's complaint] from an ordinary tort action . . . is the identity of [the defendant]." Id. at 89. We reasoned that where "identical actions could have been carried out by a private [defendant], for the same reasons and with the same regrettable consequences," substantive due process was not implicated. Id. Only where the defendant's action is "governmental in nature" -- where "a government official, because of his unique position as such, was able to impose a loss" -- would the protections of the Fourteenth Amendment come into play. Id. (internal quotation marks omitted). Because the plaintiff could not point to any state activity in the case beyond the mere presence of a state defendant, we dismissed her claim on the ground that "the substantive component of the Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." Id.

McClary thus held that a plaintiff pleads a deprivation of an interest protected by substantive due process only when he or she demonstrates some state action that distinguishes the allegation from an ordinary tort claim. On similar reasoning, we hold that a plaintiff establishes a "plus" factor for purposes of the Paul v. Davis "stigma plus" test only of he or she points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit.

3. The "plus" factor in this case. Applying this holding to the case before us, we agree with the district court that the statutory registration duties imposed on the plaintiff constitute a "plus" factor. Those obligations (1) alter the plaintiff's legal status, and (2) are "governmental in nature,"

cf. McClary, 786 F.2d at 89, insofar as they could not be imposed by a private actor in a position analogous to the state defendants, and therefore differentiate the plaintiff's complaint from a traditional defamation claim brought under state law.

The registration duties imposed by Connecticut's sex offender law are extreme and onerous. With a few exceptions, a person who is required to register because he or she was convicted of a criminal act against a minor, a nonviolent sexual offense, or a felony with a sexual purpose must verify his or her address annually for ten years. See Conn. Gen. Stat. §§ 54-251(a), 54-253(a), 54-254(a), 54-257(c). Anyone who was convicted of a sexually violent offense must do so every ninety days for the rest of his or her life. See id. §§ 52-252(a), 54-253(a), 54-257(c). To conduct this verification, the state mails to a registrant's last known address a nonforwardable form that the registrant must complete and return within ten days of receipt. See id. § 54-257(c). "In the event that a registrant fails to return the address verification form, the Department of Public Safety shall notify the local police department or the state police troop having jurisdiction over the registrant's last reported address, and that agency shall apply for a warrant to be issued for the registrant's arrest. . . ." Id.

Whenever any registrant changes his or her address, he or she must notify the Commissioner of Public Safety within five days. See id. §§ 54-251(a), 54-252(a), 54-254(a). If he or she "regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling," he or she must notify the Connecticut Commissioner and register with the appropriate agency in the other state. Id. The registrant must also provide blood samples for purposes of DNA analysis when he or she is first registered and must appear at a specified location to have his or her photograph taken whenever the Commissioner requests, see id. §§ 54-250(3), 54-251(a), 54-252(a), 54-253(b), (c), 54-254(a) but at least once every five years, see id. § 54-257(d). Failure to abide by any of these obligations constitutes a class D felony, punishable by

up to five years in prison. See id. §§ 54-251(d), 54-252(b), 54-253(c), 54-254(b).

We think that these obligations, taken together, easily qualify as a "plus" factor under Paul. The imposition on a person of a new set of legal duties, that if disregarded, subject him or her to felony prosecution, constitutes a "change of [that persons] status" under state law. Paul, 424 U.S. at 712. Such action is quintessentially "governmental in nature." McClary, 786 F.2d 89 (citation and internal quotation marks omitted). Moreover, the presence of such an alteration of the registrant's legal rights and duties serves the federalism-based function of the "plus" factor: to ensure that the plaintiff cannot convert a state-law defamation claim into a § 1983 action because of the mere fortuity that he or she is suing a state defendant. The injury that the plaintiff alleges in this case -- stigma plus an alteration of his or her state-law duties and status -- could not have been inflicted by a private person in a position analogous to that of the state. Only a defendant employing his or her "power as a state official" could impose and enforce the duties inherent in Connecticut's sexual offender registry law and then publish the information obtained by those state-imposed duties. Id. (emphasis in original).

The defendants assert that "every federal court that has addressed the issue has held that no liberty interest is implicated in such a context." Appellants' Br. at 23. They are incorrect. Prior to the district court's decision in this case, three other district courts -- including one in the Southern District of New York -- have used similar reasoning to identify a protected liberty interest under the "stigma plus" test. See Doe v. Pryor, 61 F.Supp. 2d 1224, 1231 (M.D. Ala. 1999) (concluding that the imposition of new legal duties and the extinguishment of other rights, including "the right [to] establish a new residence without giving prior notice to government officials," constitute a "plus" factor); Doe v. Pataki, 3 F.Supp. 2d 456, 468 (S.D.N.Y. 1998) ("In light of these requirements placed on registrants, there can be no genuine dispute that registration alters the legal status of all convicted sex offenders subject to the Act. . . . These requirements obviously encroach on the liberty of convicted sex offenders, and, therefore, they

suffer a tangible impairment of a right in addition to mere harm to reputation."); W.P. v. Poritz, 931 F.Supp. 1199, 1219 (D.N.J. 1996) (noting that "stigma plus" can be established "by coupling the reputational damage with the . . .continuing legal status as a registrant and the duties imposed as a result"), rev'd on other grounds sub nom. E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997).

Since oral argument of this appeal, moreover, the United States District Court for the District of Columbia has held that a sex offender registry statute similar to Connecticut's infringes upon a protected liberty interest because its registration requirements and long period of supervised release impose an "extraordinary breadth and extent of . . . burdens" which, when combined with reputational harm, satisfy the "stigma-plus" test. Doe v. Williams, No. 01-00407 (ESH), slip op. at 13, 2001 WL ____, at *___, 2001 U.S. Dist. LEXIS ____, at *___ (D.D.C. Sept. 19, 2001).

In addition, the Third Circuit has identified a protected liberty interest in these circumstances, albeit by relying upon a state-created right to privacy rather than the statutory obligations imposed on registrants. See E.B. v. Verniero, 119 F.3d 1077, 1105 (3d Cir. 1997); see also Roe v. Farwell, 999 F.Supp. 174, 196-97 (D.Mass. 1998) (same). State courts, including the Supreme Court of New Jersey in the seminal case of Doe v. Poritz, 142 N.J. 1, 99-106, 662 A.2d 367, 417-21 (1995), have reached a similar conclusion.

It is true that the Sixth and Ninth Circuits have not found a liberty interest in analogous circumstances. See Cutshall, 193 F.3d at 479-82; Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997). A substantial number of district courts have held similarly. See, e.g. Corbin v. Chitwood, 145 F.Supp. 2d 92 (D.Me. 2001); Akella v. Mich. Dep't of State Police, 67 F.Supp. 2d 716 (E.D. Mich. 1999); Femederr v. Haun, 35 F.Supp. 852 (D.Utah 1999), aff'd in part, rev'd in part, 227 F.3d 1244 (10th Cir. 2000); Lanni v. Engler, 994 F.Supp. 849 (E.D. Mich. 1998); Doe v. Kelley, 961 F.Supp. 1105 (W.D. Mich. 1997). However, these courts have not necessarily disagreed with the contention

that the ongoing legal obligations of sex offenders registrants constitute a "plus" factor. Neither the Sixth Circuit in Cutshall nor the Ninth Circuit in Russell was presented with such an argument. Instead, the plaintiff in each of those cases claimed that the "plus" factor consisted of the state's intrusion on his or her right to privacy. See Cutshall, 193 F.3d at 479; Russell, 124 F.3d at 1093-94. See also Williams, slip op. At 19-20, 2001 WL ___, at *_-*_, 2001 U.S. Dist. LEXIS ____, at *_-*_ (making similar observations about, inter alia, Cutshall and Russell).

The defendants challenge the conclusion that the Connecticut sexual offender law satisfies the "plus" requirement on two grounds. First, they allege that the registration requirements constitute only a "minimal burden" on registrants, an intrusion no more onerous than that which the federal and state tax laws impose on all citizens and no more inconvenient that the type of obligations one encounters when completing census questionnaires or renewing a driver's license. The notion that meeting the burdens of the Connecticut registry law, which we have described in some detail, is comparable to paying taxes or complying with census and driving registration regulations is breathtaking. But in any event, as we have explained, the dispositive issue is neither the degree of burden inherent in the proffered "plus" factor nor the substantiality of the interest, right, or status affected thereby. Rather, at least when the governmental action is not trivial, the inquiry turns on the character of the action on which the plaintiff seeks to establish the "plus" component. Where, as here, that action is "governmental in nature" -- a characterization supported by the defendants' comparison of the registration requirements to other obligations only the government can impose -- it constitutes a "plus" factor that triggers constitutional protection.

Second, the defendants argue that the registration requirement's relation to the stigma is too attenuated to constitute a "plus" factor. The defendants point out that the stigma arises not from the registration requirement but rather from the publication of the registration information. They contend that the harm of stigma and the additional tangible burden of the "plus" factor must arise from the

same government act. In a similar vein, the defendants point out that a hearing permitting the plaintiff to establish that he is not dangerous would remedy only the stigma while leaving the registration requirement intact. According to the defendants, this demonstrates that the "plus" factor in this case is insufficient.

We are unpersuaded by this argument. Our cases have not required the plaintiff to seek a remedy for both the stigma and the "plus" factor. See, e.g., Donato, 96 F.3d at 633 ("A hearing must be held for the limited purpose of giving a discharged employee an opportunity to clear her name. . . . The employer need not rehire the employee even if she can prove the inaccuracy of the stigmatizing allegations."); Brandt, 820 F.2d at 43 (fired government employee sought a name-clearing hearing but not reinstatement to his position). And we have never required that the stigma and the "plus" factor arise from a single government act. Indeed, in the government employment context, we have required only a "concurrent temporal link" between the separate acts of termination and defamatory statements. See Martiz, 22 F.3d at 32 (collective cases): see also Brandt, 820 F.2d at 44-45 (finding a liberty interest implicated where a government employee had been terminated but where the government had not published the reasons for the termination and the alleged stigma was merely a possible future event).

We think that the temporal nexus between the stigma and the "plus" factor in this case is sufficiently close to support a liberty interest. The information published by the State is obtained by means of the registration requirement, and a person can be stigmatized by publication of the registry only if he or she is first subjected to that requirement. The "plus" factor is thus a necessary condition for the stigmatization. Cf. Valmont, 18 F.3d at 1002 (finding a liberty interest implicated where the state's stigmatizing charges of suspected child abuse were "coupled with a statutory impediment mandating that employers justify hiring" an individual so charged).

Our reason for rejecting the defendants' argument becomes even clearer in light of the "plus" factors' function

of reserving the "heavy artillery" of the Due Process Clause for those cases involving uniquely governmental conduct. The requirement that sexual and other offenders register with the State -- a requirement that can only be imposed by the State and that is a necessary predicate for the stigmatizing publication of the registry -- places this case in that category.

III. Ex Post Facto Claim

The plaintiff cross-appeals the district court's grant of summary judgment to the defendants on his claim that the registration requirements constitutes a punishment in violation of the Ex Post Facto Clause of Article I, section 10 of the Constitution.[20] The district court observed that the Clause prohibits states from applying a new penal sanction to a crime that has already been committed. See Doe v. Lee, 132 F.Supp. 2d at 66 (citing Kansas v. Hendricks, 521 U.S. 346, 370 (1997)); see also Pataki, 120 F.3d at 1272. In performing its analysis of the Connecticut law under the Ex Post Facto Clause, the court turned to our decision in Pataki, id., which established a two-part test to determine whether the law in issue is penal..." "first, whether the legislature intended the statute to be criminal or civil; and, second, if the intent was nonpunitive, whether the statute is so punitive in fact that it cannot legitimately be seen as civil in nature." Doe v. Lee, 132 F.Supp. 2d at 66 (citing Pataki, 120 F.3d at 1273-75).

With respect to the first part of the test, the district court canvassed the "limited legislative history materials" supplied to it by the parties and held that it does not indicate a punitive legislative purpose. Id. at 67. The court noted that "there is nothing in the test [of the law] that suggests the legislature sought to punish sex offenders rather than protect public safety." Id. It also observed differences between the New York sex offender registration law at issue in Pataki and the Connecticut law, including the fact that the former, unlike the latter, provides for individualized

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[20] Art. I, § 10 of the Constitution provides, in relevant part: "No State shall . . . pass any . . . ex post facto law. . . ."

assessment of the dangerousness of the registrant. See. id. at 67-68. The court concluded that the "differences, taken separately or cumulatively and viewed in light of the [Connecticut] legislative history and the structural features indicating a regulatory purpose, do not demonstrate that the legislature acted with punitive intent" in adopting the law. Id. at 68. We find no basis upon which to disagree.

With respect to the second part of the Pataki test -- whether, although regulatory in intent, the registry law is punitive in fact -- the district court, citing Pataki, held that a fact-specific inquiry is required, but that only "the clearest proof" would suffice to meet the test. Doe v. Lee, 132 F.Supp. 2d at 68 (internal quotation marks omitted in original). In making the punitive-in-fact determination, the district court consulted the factors set forth in the Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).[21/] The court considered two aspects of the Connecticut law that the plaintiff argued indicated a "punitive effect": first, the fact that its registration requirement applies to behavior that is already a crime, and second, a perceived "excessiveness" of its dissemination of information via the Internet. Doe v. Lee, 132 F.Supp. 2d at 68-70. The court concluded: "Neither of these factors by itself, nor the two in combination, establishes by the 'clearest evidence' that the law is punitive in fact." Id. at 68.

As to the first, the fact that registration is triggered by conviction, the district court held that that could not be

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21/ The Mendoza-Martinez considerations are whether the sanction (1) involves an affirmative disability or restraint, (2) has historically been regarded as a punishment, (3) comes into play only on a finding of scienter, (4) will promote the traditional aims of punishment-- retribution and deterrence, (5) applies to behavior that is already a crime, (6) may rationally be connected to an alternative, nonpunitive purpose, and (7) appears excessive in relation to that alternative purpose.

Doe v. Lee, 132 F.Supp. 2d at 68 n.28.

enough to render the statute punitive in fact because that characteristic is "common to all regulatory disabilities that follow from a prior conviction, such as the loss of the right to vote." Id. at 69. "[T]he [Supreme] Court has found such a link insufficient to establish unconstitutionality." Id. (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365-66 (1984); United States v. Ward, 448 U.S. 242, 250 (1980)).

The district court also disagreed with the plaintiff's position that the asserted "excessiveness" of the registry scheme, principally the use of a website for dissemination, made it punitive in fact.

> There can be no doubt that Internet availability of registry information is rationally related to the goals of public safety and law enforcement. Indeed, use of the Internet is the most efficient means of making the information available to residents of the state, and it will become more efficient as Internet accessibility increases over time. Because use of the Internet furthers these nonpunitive purposes, this feature of the [statute] is insufficient to render the statute punitive in fact.

Id. (citation omitted.)

Unlike the question of legislative intent, the punitive-in-fact aspect of the Connecticut sex offender registry statute as written, is problematic. We acknowledged in Pataki that there "the question [was] not free from doubt," 120 F.3d at 1265. We ultimately held, however, that New York's version of a sex offender registration law did not violate the Ex Post Facto Clause, but we based our holding as to the punitive-in-fact inquiry significantly on the tiered structure of the New York law under which the degree of harshness with which registering offenders are treated depends on an individualized assessment of the level of risk to the community posed by each of them See Id. at 1281-83. Connecticut's law provides for no such individualized assessment, a fact at the

core of the plaintiff's challenge to it here. Cf. Doe v. Otte, 259 F.3d 979, 991 (9th Cir. 2001) (striking down Alaska sex offender registry law similar to Connecticut's on ex post facto grounds, calling it "highly significant" that the statute was not limited to persons "pos[ing] a future risk to the community.")

But we need not and do not decide whether, because of the undifferentiated nature of the Connecticut law, the Connecticut statute as written is punitive-in-fact under ex post facto analysis. We have today affirmed the court's injunction under the Doe Process Clause prohibiting the State from disseminating sex offender registry information without giving persons on the registry an opportunity to avoid being listed in a manner suggesting that he or she is probably currently dangerous by establishing that he or she is not. The State of Connecticut therefore stands enjoined from enforcing the registry law in the manner that might also render it punitive-in-fact and therefore unconstitutional under the Ex Post Facto Clause.

In order to provide for a sex offender registry and its dissemination consonant with the injunction that we affirm today, Connecticut will likely adopt new procedures more sensitive to whether those on a widely disseminated register are currently dangerous. The State may choose a scheme clearly permissible under the Ex Post Facto Clause under Pataki. Indeed, it could adopt a law constitutionally indistinguishable from that which we upheld on ex post facto grounds in this case. The plaintiff may of course challenge any new Connecticut law or procedure to determine whether it is consonant with the Ex Post Facto Clause. It will be soon enough to address the issue then.

IV. The Injunction

The district court granted the permanent injunction requested by the plaintiff. The injunction principally prohibits the defendants from "disclosing or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class [including the plaintiff] if the information identifies the class member of the due process

class as being included in the Registry." Doe v. Lee, No. 3:99CV314 (D.Conn. May 17, 2001) (order granting permanent injunction). In arriving at the terms of the injunction, the district court was required to "tailor the remedy to fit the nature and extent of the violation." United States v. Yonkers Bd. Of Educ., 837 F.2d 1181, 1235 (2d Cir. 1987). We conclude that because it is the communication to the public of the fact that the plaintiff (and other members of the class) is in the registry, without a hearing as to the current danger that the plaintiff (and other member of the class) poses, that is both central to the constitutional infirmity of the statute and the principal object of the injunction, the injunction is properly tailored to fit the nature and extent of the violation.

Finally, we note the narrowness of the basis on which we affirm the judgment of the district court and the injunction it contains. We hold only that the plaintiff and the members of the due process class are entitled to the opportunity to have a hearing consistent with due process principles to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry. We make no judgment as to what form that process should take. And we make none as to what the State may do once such a process is complete if, pursuant thereto, a particular offender is determined not to be currently dangerous or as to whether or to what extent the State may publicly disseminate information about such an offender.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, *Plaintiff*,	:	CASE NO. 3:99CV0314 (RNC)
V.	:	
DR. HENRY C. LEE ET AL., Defendants.	:	

RULING AND ORDER ON
CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff brings this action challenging the constitutionality of the Connecticut sex offender registry act ("CT-SORA"), which requires registration by, and public disclosure of information concerning, persons designated as "sexual offenders." Plaintiff claims that the statute, commonly referred to as Connecticut's Megan's Law, deprives him of a protected liberty interest in violation of the Fourteenth Amendment's Due Process Clause and, as applied to him, violates the Constitution's Ex Post Facto Clause. Cross-motions for summary judgment have been filed on potentially dispositive legal issues regarding liability.[1/] The parties agree that two issues can be decided on the record presented at this stage: (1) whether the CT-SORA imposes a "stigma" on registrants for purposes of the "stigma plus" test used to establish a liberty interest protected by the Due Process Clause; and (2) whether the statute violates the Ex Post Facto Clause.[2/]

1/ Plaintiff's Fourth Amended Complaint contains class action allegations as to both claims. The parties agree that class certification issues should not be decided until after the issues presented by the cross-motions are resolved.

2/ Plaintiff contends that the remaining aspects of the due process claim can be decided at this time as well. Defendants disagree.

Plaintiff's motion for summary judgment on the due process claim is granted essentially because the undifferentiated nature of the registry stigmatizes nondangerous registrants by grouping them together with dangerous registrants.[3/] Plaintiff alleges that he is not dangerous; the registry system alters his legal status (thereby satisfying the "plus" element of the stigma plus test): and the State provided no procedure to determine whether plaintiff is currently dangerous before including him in the registry. Defendants' motion for summary judgment on the ex post facto claim is granted because the legislature did not enact the CT-SORA with punitive intent and the law's effects are not so punishing as to render it punitive in fact. Because the parties have not yet addressed remedies, no ruling is made as to remedy at this time.

Background

A. The Statutory Scheme

In 1998 and 1999, the Connecticut legislature revised the State's version of Megan's Law in ways that spawned this lawsuit. See Public Acts No. 98-111 & 99-183 (codified as C.G.S. §§ 54-250 to -261) (collectively referred to as the "CT-SORA").[4/]

Registration Obligations

Under the CT-SORA, persons who have been convicted or found not guilty by reason of mental disease or defect of enumerated offenses must register with the Commissioner of Public Safety ("Commissioner") within three days of their release into the community. All registrants must provide the same information: name, residence address, criminal history record, fingerprints, a photograph, and a description of such other identifying characteristics as the Department of Public Safety ("DPS") requires (such as scars and tattoos). If a registrant moves he must notify the Commissioner in writing of the new address within five days.[5/] Registrants must also complete and return address verification forms sent to them by the Commissioner and submit to the retaking of a photograph at least every five years. Failure to comply with the requirements of the CT-SORA is a class D felony, punishable by up to five years in jail.

The statute applies to persons convicted of four types of offenses: criminal offenses against a victim who is a

3/ By undifferentiated I mean a system like Connecticut's, which places all registrants in one class for notification purposes -- "sex offender" -- without attempting any individualized assessment of their dangerousness or likelihood or reoffense. One commentator has termed systems without individualized risk assessment "compulsory" registries and has calculated that nineteen states have adopted such systems. See Wayne A. Logan, A Study in "Actuarial Justice: Sex Offender Class Classification Practice and Procedure, 3 Buff. Crim. L. Rev. 593, 603 (2000). The remaining states and the District of Columbia use approaches that involve the exercise of varying degrees of discretion on the part of classifying authorities. See Id. at 606-19. An example of a differentiated, or classified, system is New York's three-tier system, described in Doe v. Pataki, 120 F.3d 1263, 1266-70 (2d Cir. 1997).

4/ Federal law conditions a state's receipt of certain federal law enforcement grants on the creation of a sex offender registry program. See 42 U.S.C. § 14071. Among other things, a state must register persons convicted of certain offenses and provide the information to the F.B.I. And local law enforcement. The federal law requires that the information be released to the extent necessary to protect the public from specific individuals but does not require a state to apply its program retroactively.

5/ If the registrant moves to another state, he must contact and register with any sexual offender registry agency in the other state. Similarly, if a registrant regularly travels to or temporarily resides in another state, he must inform the Commissioner and notify the registry agency in the other state.

minor; nonviolent sexual offenses; violent sexual offenses; and felonies committed for sexual purposes. The burdens imposed on registrants vary depending on the type of offense committed. Some offenders are obliged to maintain their registrations for life,[6/] while others must do so for ten years.[7/] Registrants must complete and return address verification forms either annually[8/] or every ninety days.[9/]

The DPS is required to maintain a central registry of the information submitted by sex offenders. On receipt of an individual's information, the DPS is required to provide it to local law enforcement officials with jurisdiction over the registrant's address.[10/]

6/ Life registrants include persons who were required to register under the pre-1998 version of the CT-SORA; persons who have committed violent sexual offenses; and persons who have committed a second criminal offense against a minor or nonviolent sexual offense.

7/ Ten-year registrants include persons convicted for the first time of an offense against a minor or a nonviolent sexual offense, as well as persons who have committed a felony for a sexual purpose.

8/ Persons who have committed offenses against a minor, nonviolent sexual offenses, or felonies with sexual purposes are subject to annual verification.

9/ Persons who have committed violent sexual offenses must return forms every ninety days.

10/ If the registrant's address is in another state, the DPS must provide the information to the registry agency in the other state. See C.G.S. § 54-257(a). For all registrants, the DPS must transmit all registration information, conviction data, photographs, and fingerprints to the F.B.I. See Id.

Public Disclosure

The DPS must make the registry available to the public in a number of ways.[11/] First, the central registry maintained at the DPS must be available to the public during regular business hours. Second, local law enforcement agencies must make the information that DPS has transmitted to them available during business hours. Third, the DPS is required to make the registry information available over the Internet. Finally, the DPS must annually remind the state's media that the registry exists and provide them with information on how it can be accessed. See C.G.S. § 54-258(a)(1).

An uncodified provision of P.A. 99-183 requires that any dissemination of the registry be accompanied by the following warning: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." P.A. 99-183 § 10.

Exemption, Limitation, or Suspension of Registration

Two narrow classes of offenders may be completely exempted from the obligation to register if a court finds that

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11/ The CT-SORA does not require proactive community notification regarding any registrant's information. However, "[a]ny state agency, the Judicial Department, any state police troop or any local police department may, at its discretion, notify any government agency, private organization, or individual of registration information when such agency, said department, such troop or such police department, as the case may be, believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration." See C.G.S. § 54-258(a)(2). The CT-SORA provides no guidelines for how these entities are to exercise their discretion.

registration is not necessary to protect the public. See C.G.S. § 54-251(b), (c)[12/]

The registry data of select other offenders may be restricted by court order to use for law enforcement purposes only.[13/] For any of these offenders, the court may enter an order restricting dissemination of registry information only after finding that public safety does not require general public access to the information.

12/ Persons convicted of fourth-degree sexual assault for subjecting another person to sexual contact without consent are eligible for exemption, as are persons who were under 19 at the time of their offense and were convicted of having sexual intercourse with someone who was (1) more than two years younger than they and (2) between the ages 13 and 16 at the time of the offense.

13/ There are two ways an offender's information can become restricted. First, when the registrant's offense is sexual assault in a spousal or cohabitating relationship, see C.G.S. 53a-70b, or an offense against a person who, at the time of the offense, was under 18 and living in the registrant's household, the court can restrict access to law enforcement if it finds that public dissemination would likely reveal the identity of the victim. See C.G.S. § 54-255(a). Second, certain registrants are entitled to petition for such an order. This right of petition is available to (1) registrants who committed specific offenses between October 1, 1988, and June 30, 1999, regardless of their sentence or subsequent criminal history; and (2) any registrant convicted between October 1, 1988, and September 30, 1998, of any offense requiring registration if he served no jail time as a result of the conviction, has not been subsequently convicted of an offense that requires registration, and has been registered with the DPS as required by the CT-SORA. See C.G.S. § 54-255(c).

Finally, a person's registration is suspended if he becomes incarcerated or civilly committed or takes up residence in another state. See C.G.S. § 54-257(b).

B. Additional Undisputed Facts

The DPS has a procedure in place to respond to challenges to the accuracy or completeness of registry information, but otherwise has no discretion in determining whether individuals must register. Moreover, none of the agencies involved in the registration process (i.e., the DPS, the Department of Corrections, or the Office of Adult Probation) conducts any individualized assessment of the public safety threat posed by an individual when deciding whether he must register.

C. The Web Site

The DPS Sex Offender Registry web site permits any Internet user visiting the site to search and display the information contained in the registry database. The database can be searched by last name, the first letter of a last name, a town name, or a zip code. Searching by town or zip code provides a list of the names of all registrants living in that area.

Clicking on a listed name brings up a web page entitled "Registered Sex Offender." If the registrant has complied with the CT-SORA's requirements, there have been no technical difficulties, and the DPS has had time to process and post the registrant's information, this page contains the registrant's name, offense, current residence address, physical description and photograph.

At the time the parties filed their briefs, the front page of the web site included the following language:

> This information is made available for the purpose of complying with Connecticut General Statutes § 54-250 et seq., which requires the Connecticut Department of Public Safety to establish and maintain a

registry of persons who are required to register under sections 54-250 through 54-254 of the General Statutes. [Those statutes require that certain individuals be included in the registry because of their conviction or finding of not guilty by reason of mental disease or defect of a specified criminal offense and subsequent release into the community on or after October 1, 1988.] The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the Registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this date on the Internet is to make the information more easily available and accessible, not to warn about any specific individual. Anyone who uses this information to injure, harass, or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.[14/]

D. The Plaintiff

Plaintiff is required to register under the CT-SORA. He alleges in the Fourth Amended Complaint that he is not

14/ Since the briefs were filed, the DPS has modified the format of the front page and the language quoted in the text no longer appears as a single paragraph; however, the substance of the quoted paragraph remains on the front page.

a dangerous sexual offender and does not pose a threat to the safety of the community. Defendants contend that all the information on the CT-SORA web site regarding plaintiff is accurate and that he provided the information regarding his birth date, address, physical description, criminal offenses, and other identifying information. Plaintiff does not contend that any piece of date is inaccurate.

Discussion

I. Due Process Claim

Plaintiff claims the CT-SORA violates the Due Process Clause of the Fourteenth Amendment. To succeed on this procedural due process claim, plaintiff must demonstrate (1) that the CT-SORA deprives him of a constitutionally protected liberty interest; and (2) that the procedures attending the deprivation are inadequate. See Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989). To establish a protected liberty interest, plaintiff must satisfy the "stigma plus" test applied in the Second Circuit. See Valmonte v. Bane, 18 F.3d 992, 999 (2d Cir. 1994); Doe v. Pataki, 3 F.Supp. 2d 456, 467 (S.D.N.Y. 1998).

Plaintiff prevails on the due process claim because the State has not provided him with any opportunity to challenge the stigmatizing allegation, implied by his inclusion in the publicly available registry, that he is a dangerous sex offender. The implied allegation, which plaintiff contends is false, arises from the undifferentiated nature of the registry, in which dangerous and nondangerous registrants are grouped in a single classification and no information is provided regarding any registrant's dangerousness. Because there can be no doubt that some registrants are dangerous, Connecticut's single classification falsely suggests that nondangerous registrants are a threat to public safety. In addition to falsely stigmatizing nondangerous registrants, the CT-SORA alters their legal status under state law.[15/]

15/ Defendants suggest that the undifferentiated nature

A. Stigma

Plaintiff first must prove that his "inclusion in the [publicly disseminated sex offender registry] will result in stigma, that is, in 'public opprobrium' and damage to [his] reputation." Valmonte v. Bane, 18 F.3d 992, 999 (2d Cir. 1994) (quoting Bohn v. County of Dakota, 772 F.2d 1433, 1436 n.4 (8th Cir. 1985)). Plaintiff contends that he is stigmatized because his inclusion in the registry conveys the false message that he is a dangerous sex offender and a threat to public safety. Defendant contends that the registry sends no message about a registrant's dangerousness and communicates only the admittedly accurate information that plaintiff has been convicted of a crime requiring registration.

When, as here, a plaintiff seeks not damages but rather an opportunity to be heard in order to establish that a communication about him is false, the plaintiff need only allege-- not prove-- that the communication at issue is not true. See Brandt v. Board of Coop. Ed. Servs., 820 F.2d 41, 42-44, (2d Cir. 1987) (citing Codd v. Velger, 429 U.S. 624, 627 (1977) (finding plaintiff's action for name-clearing

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of the registry requires rejection of plaintiff's due process claim because a hearing would not serve any useful purpose. See, e.g., Defs.' Mem. At 20-21, 30-31. However,

> the fact that a particular jurisdiction's registration and notification scheme does not differentiate among offenders, and thus relies exclusively upon blanket legislative assessment of community danger, should not alter the liberty interest analysis. The constitutional question is not whether offender differentiation is contemplated by the particular statutory scheme in question; rather, it is whether a liberty interest exists sufficient to warrant due process protection.

Wayne A. Logan, Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws, 89 J. Crim. L. & Criminology 1167, 1210-11 (1999).

hearing fatally deficient because of failure to contend that employer's communication was false).[16] Accordingly, to establish that the CT-SORA implicates a liberty interest, plaintiff must establish that the charge against him is stigmatizing, that he alleges it to be false, and that a plus factor is present. Plaintiff satisfies the allegation-of-falsity element by the amendment to his complaint approved today in a separate order. See Fourth Am. Compl. ¶ 4.

The stigma question thus becomes whether, assuming plaintiff is not dangerous, public dissemination of the sex offender registry conveys the erroneous message that he is. The answer to this question must be yes. Despite the accuracy of the registry data concerning the plaintiff and the statement on the web site that no determination of any individual's dangerousness has been made, the registry suggests that plaintiff is currently dangerous. Specifically, the undifferentiated nature of the registry and the undisputed purposes of the CT-SORA make it reasonable for a viewer of the registry to conclude that any particular registrant is dangerous.[17]

16/ Kelly Kare, Ltd., v. O'Rourke, 930 F.2d 170, 177 (2d Cir. 1991), which states that "plaintiff must establish that the information was stigmatizing, false and publicized by the state actor," is not to the contrary. Kelly Kare citing Brandt as the primary authority for the quoted proposition and indicated no disagreement with the distinction made by Brandt between actions for damages and actions seeking a name-clearing hearing. While the Kelly Kare plaintiff did seek an injunction, the decision in that case did not turn on whether the plaintiff had alleged or proven falsity. Rather, the court found that, because the county had been silent as to the reason for its termination of Kelly Kare's contract, there was no communication that could be seen as stigmatizing or false.

17/ Plaintiff contends that the registry's availability on the Internet is by itself an additional contextual factor that conveys the message that registrants are dangerous. Governmental use of the Internet to

The stated purposes of the CT-SORA are to protect the public and facilitate law enforcement.[18/] Registration and dissemination serve these goals only because some registrants are likely to reoffend. Thus, the message that some registrants are currently dangerous is, and is intended to be, communicated to viewers of the registry.

A person viewing any one registrant's information is told that the State has not assessed the registrant's risk of reoffense and has not determined whether he is currently dangerous. While it is true, then, that the viewer has no reason to think the registrant is one of those who is dangerous, the viewer also has no reason to think the registrant is not dangerous. Because there is no classification system, the viewer has neither absolute nor relative information regarding the dangerousness of the registrant. Without such information, the viewer could reasonably conclude that the registrant is likely toreoffend.

Defendant do not dispute that within the group of persons required to register as sex offenders there is significant variation in the likelihood of particular offenders committing another "sex offense."[19/] This variation is

disseminate information is now commonplace, however, and no special message should be associated with the registry simply because it can be accessed via the Internet. Adopting plaintiff's position would prohibit the State from taking information that is already publicly available in its compiled form and making it more ready available.

18/ Defendants contend that these are the statute's purposes. Plaintiff has provided numerous news articles supporting his contention that the State has contributed to public understanding of these purposes through statements made by the Governor, legislators, the Commissioner, and other officials.

19/ This is particularly true for the Connecticut system, under which some of the "sex offenses" do not require any sexual conduct by the registrant.

presumably the reason why other states have adopted a tiered registry and notification system, under which sex offenders are subgrouped according to their individually assessed risk of reoffense. See Doe v. Pataki, 3 F.Supp. 2d 456, 462 (S.D.N.Y. 1998) (describing the New York system, which has low-, moderate-, and high-risk classes). In a tiered system, a recipient of a registrant's information can discern the dangerousness of that registrant relative to the universe of sex offenders. By omitting to provide such relative information, Connecticut's system has the effect of falsely suggesting that nondangerous registrants are in fact dangerous.[20/]

B. Plus Factors

Damage to reputation, without more, is insufficient to establish a liberty interest protected by the Due Process Clause. The stigmatizing conduct must be accompanied by some tangible injury or material alteration of legal right or status. See Paul v. Davis, 424 U.S. at 701, 708; Valmonte v. Bane, 18 F.2d at 999-1000. Plaintiff satisfies this plus element because the registration requirements of the CT-SORA alter his legal status under state law.

The CT-SORA requires registrants to appear at the Department of Public Safety to register or undergo registration processes before their release from incarceration. For at least ten years after that, and possible for life, a registrant must maintain his registration by

These nonsexual sex offenses include various degrees of kidnapping and unlawful restraint when the victim is under 18. While these offenses are classified by the statute as criminal offenses against a minor rather than as violent or nonviolent sexual offenses, registrants convicted of these offenses are still grouped under the label "sex offender."

20/ Cf. Doe v. Pryor, 61 F.Supp. 2d 1224, 1231 (M.D. Ala. 1999) (noting that community notification "strongly implies that [a registrant] is a likely recidivist and a danger to his community.")

completing forms periodically mailed to him by the Department and appearing at the DPS to have his photograph taken at least every five years. During his registration period, a registrant must promptly inform the DPS any time he moves or if he regularly travels to or temporarily resides in another state. If a registrant does move to, regularly travel to, or temporarily reside in another state, he must ascertain if that state has a registration agency and whether he is required to register with it; if that is the case, he must then perform whatever acts are required to comply with the other state's registry program. Failure to comply with any of the registration requirements is a Class D felony, punishable by imprisonment for up to five years.[21/]

Defendants counter with two arguments: first, that the registration requirements are incidental, regulatory burdens, which cannot satisfy the plus element; and, second, that the registration burdens do not measure up to the type of deprivation of a right that the Second Circuit has previously held to be a plus factor.

Defendants' first line of argument misses the mark. The burdens on registrants are significantly more extensive than simply providing change of address information, which is how defendants characterize them. Moreover, while courts have found registration requirements to be regulatory and nonpunitive-- and therefore not an affirmative disability or restraint for ex post facto purposes-- it does not follow that such requirements do not alter a registrant's rights or status under state law.

21/ Relying on my ruling in Doe v. DPS, No. 3:99CV135, slip op. (D.Conn. Mar. 9, 1999) and on Doe v. Pataki, 3 F.Supp. 2d at 468, plaintiff argues that these requirements constitute an alteration of legal status sufficient to satisfy the plus element. The obligations imposed by the CT-SORA as just described are more burdensome than they were when I ruled in Doe v. DPS, and in their current form are more burdensome than the ones described in Doe v. Pataki.

Defendants' second argument, which suggests that the plus factor can come only from a deprivation of employment closely linked to the stigmatizing conduct, is also unavailing. Courts have held that the alteration of legal status and the burdens accompanying registration under a sex offender law satisfy the plus element. See Doe v. Pataki, 3 F.Supp. 2d 456, 468 (S.D.N.Y. 1998); W.P. v. Poritz, 931 F.Supp. 1199, 1219 (D.N.J. 1996); Doe v. Attorney General, 715 N.E.2d 37, 43 (Mass. 1999) (interpreting the Massachusetts Constitution).[22/] Moreover, while Valmonte v. Bane and other Second Circuit cases finding stigma-plus arise in the employment context, Valmonte recognizes that none of those cases "foreclosed the possibility that the 'plus' element could come from some other independent deprivation." Valmonte, 118 F.3d at 1002. Valmonte requires that the plus factor come from a "tangible burden" separate from the "deleterious effects which flow directly from a sullied reputation." Id. at 1001. Paul v. Davis, 424 U.S. 693 (1976), speaks generally of the alteration or deprivation of a legal right or status under state law, see id. at 711-12, and identifies (without using the term) the plus factor in Wisconsin v. Constantineau, 400 U.S. 433 (1971), as the loss of the right to buy alcohol, which has no direct connection with employment, see id. at 708-09.

The burdens imposed by the CT-SORA may entail greater infringement on personal liberty than the type of deprivation at issue in employment cases. In those cases, the government statute, policy, or statement does not mandate any future action by the target of the defamation. Rather, the plus factor is generally satisfied by a one-time event that has already occurred, such as dismissal from an existing job or preclusion from another job. The

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22/ Doe v. Pryor, 61 F.Supp. 2d 1224 (M.D. Ala. 1999), also found a plus factor in the burdens of a sex offender statute, but those burdens went beyond the CT-SORA's registration requirements to include prohibitions on living or working within 1000 feet of a school or day care, residing with a minor child not the registrant's biological or adopted child, and changing one's name. See Id. 1227.

CT-SORA, on the one hand, requires nondangerous registrants to repeatedly take specific actions to facilitate the government's ongoing defamatory communications. This is no small matter. As the Massachusetts Supreme Judicial Court has noted, registration under a sex offender statute is

> a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government.

Doe v. Attorney General, 715 N.E.2d 37 at 43. Because the registration requirements alter the offenders' status under state law, they satisfy the plus element and plaintiff has thus established that the registry's "allegation" that he is dangerous implicates a liberty interest protected by the Fourteenth Amendment.[23/]

C. The Process that is Due

Having determined that dissemination of the undifferentiated registry deprives nondangerous registrants of a constitutionally protected liberty interest, I turn to consider whether the procedural safeguards provided by the State are adequate. Due process requires, at a minimum, notice and an opportunity to be heard. See Mathews v.

23/ Plaintiff contends that the stigmatizing conduct denies a protection of reputation guaranteed by Article I, § 10, of the Connecticut Constitution, will have negative effects on the employment prospects and family relationships of registrants, and will likely result in harassing and abusive attacks on registrants. Because the burdens of the registration requirements constitute a plus factor, there is no need to address these other alleged consequences of the CT-SORA.

Eldridge, 424 U.S. 319, 333 (1976). Beyond that, the amount of process due is generally determined under the framework of Mathews v. Eldridge. In this case, it is not necessary to engage in the Mathews balancing because it is undisputed that the CT-SORA provides no procedure to determine a person's dangerousness before he is included in the registry. It suffices to say that under the Connecticut system nondangerous registrants do not have an adequate opportunity to be heard before the deprivation of their liberty interest and thus are denied their Fourteenth Amendment right to due process.

II. Ex Post Facto Clause

Plaintiff's claim based on the Ex Post Facto Clause present the question whether the CT-SORA imposes a penal sanction. The Ex Post Facto Clause forbids application of a new penal sanction to a crime that has already been committed. See Kansas v. Hendricks, 521 U.S. 346, 370 (1997); Doe v. Pataki, 120 F.3d 1263, 1272 (2d Cir. 1997) (hereinafter "Doe"). The Second Circuit has established a two-part test to determine whether a law is penal: first, whether the legislature intended the statute to be criminal or civil; and, second, if the intent was nonpunitive, whether the statute is so punitive in fact that it cannot legitimately be seen as civil in nature. See Doe, 120 F.3d at 1274-75. The features of the CT-SORA on which plaintiff primarily relies (namely, widespread dissemination of registration information with no individualized assessment of dangerousness) make this a somewhat closer case than recent cases in which the Second Circuit rejected ex post facto claims. See Doe; Roe v. Office of Adult Probation, 125 F.3d 47 (2d Cir. 1997). However, I agree with the defendants that the CT-SORA is regulatory in both intent and effect. Accordingly, their motion for summary judgment on the ex post facto claim is granted.

A. Legislative Intent

Public Acts 98-111 and 99-183 are not Connecticut's first enactment of Megan's Law; they are follow-on statutes to an earlier version. The Second Circuit

has stated that the earlier version was enacted in response to concerns "regarding the harm to society caused by sex crimes and the relatively high rate of recidivism among sex offenders." Roe, 125 F.3d at 48. The Connecticut Supreme Court has expressly agreed with the Second Circuit's characterization. See Connecticut v. Misiorski, 738 A.2d 595, 601-602 (Conn. 1999). Given the nonpunitive purpose of the prior law, plaintiff can succeed on his ex post facto claim only if he demonstrates that the legislature acted with punitive intent when it amended the prior law or that the new regime it created is punitive in fact.

The legislature's intend, which can be either express or implied, see Hudson v. United States, 522 U.S. 93, 99 (1997) (citing United States v. Ward, 448 U.S. 242, 248 (1980)), is determined by considering the law's legislative history, its text (including any preamble), and its structural features. See Doe, 120 F.3d at 1276-78. The limited legislative history materials the parties have provided, which are somewhat informative on the issue of intent, do not establish that the legislature abandoned its nonpunitive purpose.[24/] Plaintiff makes no claim that the text of the law

24/ In general, comments of individuals involved in the legislative process do not provide a sure basis for determining legislative purpose. See Doe, 120 F.3d at 1277 (noting that "floor debates are of particularly limited assistance in resolving highly controversial issues of legislative intent.") The views expressed by a law's sponsors, however, are entitled to greater weight than those of other commentators. See Id. Defendants present the Connecticut House Judiciary Committee testimony of Michael Cicchetti, Undersecretary of the Office of Policy and Management ("OPM"), introducing P.A. 99-183, who stated that the purpose of the registry law is to "make it possible for the public to protect itself" and not to impose "additional punishment for [sex] offenders." OPM was one of the many government agencies that participated in a committee established by P.A. 99-111 to monitor the implementation of P.A. 98-111 and to

manifests a punitive intent, and there is nothing in the text that suggests the legislature sought to punish sex offenders rather than protect public safety.[25/] That leaves the statute's structural features.

Several features of the law clearly support a nonpunitive, public-safety orientation: (1) an offender is not required to register, and thus no information can be made publicly available, until the time of his release, cf. Doe, 120 F.3d at 1278 (noting that the offender's assessment is not done until just before release); (2) any public dissemination of registry information must provide a warning that anyone who uses the information to harass a registrant is subject to criminal prosecution; (3) while the class of registrants eligible to petition to be relieved of the registration or notification burdens is narrower than in other systems, the burden on those eligible to petition is to show that they are not a danger to the public; and (4) an offender's registration is suspended when he is in jail or living out of the state and thus does not present a danger to Connecticut residents.

recommend amendments. The bill Cicchetti introduced contained those recommendations, and he can be regarded as speaking on behalf of the bill's sponsors. The floor statements of the sponsors of both bills and their answers to questions, viewed as a whole, also show that the law's purposes are to protect the public and facilitate law enforcement.

Plaintiff cites statements by other legislators, who recognized the detrimental effects on an offender's life that are incidental to registration and notification. Those citations do not establish that those legislatures or any others acted for the purpose of bringing about such effects. As in Doe, plaintiff here has failed to produce legislative history that provides the "'unmistakable evidence of punitive intent' required to demonstrate punitive motivation." Doe, 120 F.3d at 1277 (citing Flemming v. Nestor, 363 U.S. 603, 619 (1960)).

25/ Neither P.A. 98-111 nor P.A. 99-183 contains any preamble or statement of purpose to assist in resolving this question of legislative intent

On the other hand, the CT-SORA differs from the statute in Doe and the policy in Roe in the following ways: (1) the amount of information about a registrant that is revealed, and the way in which it is revealed, is not linked to any individualized assessment of the registrant's dangerousness; (2) some of the safeguards regarding the release of information that were noted by the Doe court are not provided;[26/] and (3) a defendant must be made aware of the registration and notification requirements before entering a guilty plea to an enumerated offense, something apparently not required by the statute in Doe.

These differences, taken separately or cumulatively and viewed in light of the legislative history and the structural features indicating a regulatory purpose, do not demonstrate that the legislature acted with punitive intent when it adopted Public Acts 98-111 and 99-183.[27/]

26/ Unlike the New York statute in Doe, the CT-SORA does not create a new criminal offense for misuse of registry information and does not require any identifying information from a member of the public prior to giving him or her access to the registry.

27/ It bears noting that the individualized assessments in Doe and Roe were part of a system that involved significant, potentially mandatory proactive notification of victims, family, neighbors, employers, and at-risk groups.

Also, while a defendant who seeks to plead guilty must be informed of the potential punishment he could receive, it does not follow that every potential consequence brought to the defendant's attention is an element of punishment. See Cucciniello v. Keller, 137 F.3d 721, 725 (2d Cir. 1998) (recognizing that some "substantial consequences" of a guilty plea are not part of punishment and thus need not be noticed before the plea is taken, but suggesting that judicial officers might nevertheless find it advisable to give such notice).

B. Punishment in Fact

Next, it must be determined whether the statute, though intended to be regulatory or nonpunitive, is nevertheless so punitive in fact as to violate the ex post facto prohibition. This question is highly context specific. See Doe, 120 F.3d at 1275. Moreover, the plaintiff has a heavy burden of showing by "the clearest proof" that the statute is so punitive in form and effect as to render it criminal despite the legislature's intent to the contrary. See Doe, 120 F.3d at 1274. "[F]or the effects of a measure to render it 'punishment,' those effects must be extremely onerous . . . . The only examples the case law suggests of effects sufficiently onerous are deprivation of one's United States citizenship that leaves one a 'stateless person' and a complete deprivation of personal freedom (i.e., incarceration)." E.B. v. Verniero, 119 F.3d 1077, 1101 (3d Cir. 1997).

To guide inquiry at this stage, the Supreme Court and the Second Circuit have considered the factors identified in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963), while recognizing that those factors are neither exhaustive nor dispositive. See Doe, 120 F.3d at 1275 (citing Ward, 448 U.S. at 249)).[28/] Both courts have also recognized that the factors often point in different directions. See Mendoza-Martinez, 372 U.S. at 168; Doe, 120 F.3d at 1274.

28/ The Mendoza-Martinez considerations are whether the sanction (1) involves an affirmative disability or restraint, (2) has historically been regarded as a punishment, (3) comes into play only on a finding of scienter, (4) will promote the traditional aims of punishment-- retribution and deterrence, (5) applies to behavior that is already a crime, (6) may rationally be connected to an alternative, nonpunitive purpose, and (7) appears excessive in relation to that alternative purpose.

Plaintiff contends that two of the Mendoza-Martinez factors show the CT-SORA to be punitive in fact: (1) the statute's registration requirements are triggered solely by the offender's conviction; and (2) Internet availability of registry data is unnecessary to achieve the statute's stated remedial purposes. Neither of these factors by itself, nor the two in combination, establishes by the "clearest evidence" that the law is punitive in fact.

Tie to criminal conduct The fact that the statute's registration requirement are triggered by an offender's conviction does not establish that the law is punitive in fact. Doe recognizes that such a trigger is common to all regulatory disabilities that follow from a prior conviction, such as the loss of the right to vote. Doe also recognizes that disabilities challenged under the Ex Post Facto Clause and upheld by the Supreme Court in several cases were triggered solely by a prior conviction. See Doe, 120 F.3d at 1281 (citing, among other cases, Hawker v. New York, 170 U.S. 189, 196-97 (1898) (upholding law under which felony conviction was conclusive evidence of lack of fitness to practice medicine)).[29/] See also Cutshall v. Sundquist, 193 F.3d 466, 476 (6th Cir. 1999) ("[A]lthough the registration and notification provisions are intertwined with the offender's underlying conviction, they impose no additional penalty . . . ."). Even in plaintiff's main case on this point, Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994), the tie between the sanction and criminal conduct was only one of several factors that led the Supreme Court to conclude that the sanction was punitive. See id. at 780-83. Elsewhere, the Court has found such a link insufficient to establish unconstitutionality. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365-66 (1984); Ward, 448 U.S. at 250.[30/]

29/ Hawker establishes that it is permissible to use a conviction as conclusive evidence that a sanction should apply, contrary to plaintiff's suggestion that the conviction may be used only as evidence in a subsequent proceeding.

30/ It bears noting that application of the CT-SORA is not conditioned on scienter or a finding of criminal culpability. The CT-SORA applies not only to people who plead guilty to a covered offense or are convicted after trial, but also to people who plea nolo contendere or are found not guilty by reason of mental disease or defect. See C.G.S. §§ 54-250(1); 54-251; 54-252; 54-253; see also Hendricks, 521 U.S. at 362 (finding significant the fact that people absolved of criminal culpability were still subject to the statute).

Excessiveness Plaintiff's argument that Internet dissemination is excessive relative to the goals of public safety and assisting law enforcement has some force. Connecticut's web site makes more information available to more people than is necessary to achieve its public safety and law enforcement goals.[31/] Because Connecticut does not conduct an individualized assessment of each registrant, the web site conveys information about people who present either no risk or only a low risk of reoffending. Moreover, because the Internet is a global medium, the web site makes information available to millions of people who will never come to the state or otherwise come into contact with a registrant. As a result, Connecticut's approach is significantly different from the "occasionally imprecise targeting" that Doe ascribed to the New York statute. See Doe, 120 F.3d at 1282.

Nevertheless, I am not convinced that Connecticut's use of the Internet to disseminate registry data makes the CT-SORA punitive in fact. There can be no doubt that Internet availability or registry information is rationally related to the goals of public safety and law enforcement. See Fedemeer v. Haun, 227 F.3d 1244, 1253 (10th Cir. 2000). Indeed, use of the Internet is the most efficient means of making the information available to residents of

31/ Defendants do not dispute that their web sife also exceeds the availability requirements of the federal statute, which mandate that information be released only "where it is necessary to protect the public concerning a specific person." 42 U.S.C. § 14071(e)(2).

the state, and it will become more efficient as Internet accessibility increases over time. Because use of the Internet furthers these nonpunitive purposes, this feature of the CT-SORA is insufficient to render the statute punitive in fact. See United States v. Ursery, 518 U.S. 267, 290 (1996) ("Most significant is that [the challenged statutes], while perhaps having certain punitive aspects, serve important nonpunitive goals."); E.B. v. Verniero, 119 F.3d 1077, 1097 (3d Cir. 1997) ("The relevant issue is whether [the notification provisions] are reasonably related to a legitimate goal.").

Plaintiff contends that Connecticut has an obligation to more closely tailor its notification system to the statute's regulatory purposes, relying principally on Femedeer v. Haun, 35 F.Supp. 2d 852 (D.Utah 1999), which addressed a Utah web site providing Internet access to that state's registry.[32/] The district court's decision in Femedeer has been reversed since plaintiff filed his memorandum. See Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000). Rejecting arguments very similar to those plaintiff makes here, the Tenth Circuit noted that "the district court [had] failed to consider . . . that . . . . the farther removed one is from a sex offenders community and from Utah generally, the less likely one will be to have an interest in accessing" the Utah registry. Id. at 1253. The Tenth Circuit also accepted a significant degree of imprecision in Utah's system, declining to require a more rigorous risk assessment mechanism. See id. ("[A] statute is not necessarily excessive . . . simply because a state has perhaps not achieved a perfect fit between ends and means.").

Other Factors None of the other Mendoza-Martinez factors supports a finding that the CT-SORA is punitive. The burdens of registration and ongoing address verification are not the type of affirmative disability or restraint

32/ Plaintiff's invocation of "other contexts" in which the Supreme Court has required that a sanction be more closely tailored to an individual's dangerousness is unpersuasive. See Pl.'s Mem. At 36. Each of the cases plaintiff cites involved physical detention or confinement

suggestive of a punitive sanction. See Cutshall, 193 F.3d at 474 ("The first [Mendoza-Martinez] factor, an affirmative disability or restraint, is some sanction approaching the infamous punishment of imprisonment." (citation and internal quotation omitted)); cf. Hudson, 522 U.S. at 104 (rejecting petitioners affirmative disability argument as nothing approaching the 'infamous punishment' of imprisonment" (internal quotation omitted)). As Doe pointed out, the Supreme Court has upheld civil sanctions with burdens much more onerous that those at issue here. Doe, 120 F.3d at 1279 (citing, inter alia, Hendricks v. Kansas, 521 U.S. 346 (1997) (upholding involuntary civil commitment sanction against an Ex Post Facto Clause challenge); see also Seling v. Young, 121 S.Ct. 727 (2001) (rejecting an "as applied" challenge to Washington's civil commitment statute).

Also, contrary to plaintiff's suggestion, "the fact that notification serves to deter sex offenders, both specifically and generally, from committing crimes in the future is not indicative of punitiveness." Doe, 120 F.3d at 1283; see also Hudson, 522 U.S. at 105 ("To hold that the mere presence of a deterrent purpose renders . . . sanctions 'criminal' for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation . . . .").

Aggregate assessment Only two of the Mendoza-Martinez factors arguably indicate a punitive effect: the tie to criminal conduct and the excessiveness of the sanction relative to nonpunitive purposes. Neither one by itself is sufficient to overcome the legislature's nonpunitive intent. See Hudson, 522 U.S. at 101 (rejecting the Supreme Court's apparent prior elevation of the excessiveness factor to dispositive status); One Assortment of 89 Firearms, 465 U.S. at 365-66 (holding that a punitive indication from the tie-to-criminal-conduct factor does not alone establish the necessary "clearest proof"); Ward, 448 U.S. at 249-50 (same). Nor does the combined effect of these two factors suffice to establish by the clearest proof that the law is punitive in fact. Accordingly, defendants'

motion for summary judgment on the ex post facto claim is granted.

Conclusion

In accordance with the foregoing, plaintiff's motion for summary judgment on the due process claim is granted and his motion as to the ex post facto claim is denied. Defendants' cross-motion for summary judgment as to the stigma aspect of the due process claim is denied and their cross-motion as to the ex post facto claim is granted. The ex post facto claim is dismissed.

So ordered.

Dated at Hartford, Connecticut this 31st day of March 2001.

Robert N. Chatigny
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE,	:	
Plaintiff,	:	
	:	CASE NO. 3:99CV314 (RNC)
V.	:	
	:	
DR. HENRY LEE,	:	
ET AL.,	:	
Defendants.	:	

RULING AND ORDER GRANTING PERMANENT INJUNCTION

For reasons more fully stated in a ruling and order on cross-motions for summary judgment date March 31, 2001, the Court has determined that public disclosure and dissemination of plaintiff's inclusion in the sex offender registry maintained by the defendants pursuant to the Connecticut sex offender registry act, Connecticut General Statutes §§ 54-250 et. seq. (the "Registry" and the "Act") violates plaintiff's rights under the Due Process Clause of the Fourteenth Amendment. Plaintiff has been included in the registry, not because he has been determined to pose a threat to public safety, but solely because he has been convicted of one of the numerous offenses enumerated in the Act. Plaintiff has a liberty interest in not being falsely labeled a dangerous sex offender -- a label inherent in his inclusion in the undifferentiated registry. Defendants have deprived him of that interest without providing him notice and an opportunity to be heard on the question whether he is dangerous.

The Court has granted plaintiff's motion to certify a class of all persons who are subject to the registration and public disclosure requirements of the Act without notice and an opportunity to be heard on the question whether they are dangerous (the "due process class"). Class certification is appropriate under Rule 23(b)(2) of the Federal Rules of Civil Procedure because the requirements of numerosity, commonality, typicality, and adequacy of representation are

satisfied and defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

Accordingly, it is hereby ordered:

Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, are permanently enjoined from:

1) disclosure or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class if the information identifies the class member as being included in the Registry; and,

2) identifying any member of the due process class as being included in the Registry;

provided that nothing in this order shall:

1) impair access to the Registry by law enforcement agencies and officers, including but not limited to the Connecticut Department of Correction, Board of Pardons, Board of Parole, Court Support Services Division, and Division of Criminal Justice;

2) preclude law enforcement agencies and officers carrying out official duties from using information contained in the Registry in specific criminal investigations and prosecutions, so long as members of the due process class are not described to the public as being included in the Registry;

3) preclude law enforcement agencies and officers carrying out official duties from disclosing or disseminating to the public information necessary to protect the public concerning a specific

person, so long as members of the due process class are not described to the public as being included in the Registry; or

4) affect the public's ability to obtain individual criminal conviction history records pursuant to Connecticut General Statutes Sections 1-210 et seq. and 29-11 et seq.

Defendants are directed to serve a copy of this order on each local police department, law enforcement agency, or other state or local entity to which they have transmitted the Registry or Registry information. Each such department, agency, or entity is bound by this order.

Pursuant to this order, but without limitation of it, defendants shall immediately take down the Registry website and cease making publicly available the Registry information maintained pursuant to C.G.S. § 54-258(a)(1) at the Department of Public Safety and at local police departments and state police troops.

This order is a statement of federal law that supersedes any state law to the contrary, including without limitation the Connecticut Freedom of Information Act.

So ordered.

Dated at Hartford, Connecticut, this 17th day of May 2001.

Robert N. Chatigny
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN DOE,	:	NO. 3:99CV314 (RNC)
Plaintiff	:	
	:	
V.	:	
	:	HARTFORD,
PUBLIC SAFETY,	:	CONNECTICUT
Defendant	:	MAY 18, 2001

TELEPHONE CONFERENCE

BEFORE:
HON. ROBERT N. CHATIGNY, U.S.D.J.

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

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ASSISTANT AG
HENRI ALEXANDRE, ASSISTANT AG
MAURA FITZGERALD, ASSISTANT AG
GREG D'AURIA, ASSOCIATE AG
CAROLYN QUERIJERO, DEPUTY AG

Darlene A. Warner, RDR-CRR
Official Court Reporter

9:00 A.M.

THE COURT: Good morning. Would you please state your appearances for the record starting with plaintiff's counsel.

MS. SADIN: Yes, sir, Shelley Sadin appearing for John Doe, Mr. Tegeler is not available this morning, sir.

THE COURT: Thank you.

MS. CHAPPLE: Barbara Chapple, Assistant Attorney General for the defense. And with me is Assistant Attorney General Greg D'Auria, Deputy Attorney General Carolyn Querijero, Henri Alexandre, Assistant Attorney General, and Maura Fitzgerald.

THE COURT: I wanted to speak with you first thing this morning if possible to attend to the matters that need to be addressed in the Doe case. I know that we had spoken about doing something around midday today or perhaps somewhat later than that. However, in light of the correspondence that I received late yesterday from both sides, it seemed to me best, indeed, absolutely necessary, to proceed at the earliest opportunity. Accordingly, I appreciate your being available at this hour.

The plaintiff's submission tells me that the defendants have said they would like additional time to consider the order that has been proposed by the plaintiff and to make additional comments. Is there anything more that the defendants would like to say.

MS. CHAPPLE: Not at this time, Your Honor. I think any comments that we've had we've already included or we've conveyed them to the plaintiffs and they've been included in the proposed order. We don't intend to submit anything further.

THE COURT: All right, fine.

MS. SADIN: If Your Honor please, one thing that occurred to me that I think we need to attend to, and that is that the defendants have already disclosed and provided copies of the registry to agencies and officers and I think we need to -- I don't think that this order really covers that.

For example, when Your Honor mentioned the other day that one of the ways that the -- that we need to address the disclosure issue is to take the registry off the desks at

the police department. I'm not sure that the way we've worded the order so far accomplishes that.

THE COURT: We've addressed that.

MS. SADIN: I think we need to add a clause.

THE COURT: We've done that. And before we're through, I'll read what we have and I'll make this available to you so that you can pick it up.

MS. SADIN: Okay.

THE COURT: All right?

I know the Attorney General's office is just around the corner and it's very easy for the defendants to get access to this order. It may not be quite as easy for you, but it will be available for you as soon as we're off the phone.

MS. CHAPPLE: Your Honor, we'd be happy to pick up a copy and fax it to Shelley.

MS. SADIN: That would be great.

THE COURT: Thank you.

I looked at a transcript of our discussion on the 15th and I note that when I referred to the motion for class certification, I said that I intended to grant it. And to clarify any ambiguity in that regard, I will say for the record now that the motion has been granted.

As I told you in court, I'm persuaded that the plaintiff has satisfied all the requirements for a class treatment. You will be receiving a short statement from me in the nature of a brief memorandum of opinion on the class certification issue, but I think the basis for granting the motion is apparent to us all.

With regard to the proposed order, I have a question that I would like you to address. The proposed order talks about disclosing the registry or information. And I think I have a clear idea of what we are trying to do with this order and I'm not sure that the language that you propose is ideal.

MS. SADIN: That wouldn't surprise me.

THE COURT: We plainly do not want the registry, as such, being made available to the public, whether electronically, via the internet, or in book form at the police stations. The registry, as such, may not be publicly disclosed or disseminated.

With regard to registry information, that is to say information contained in the registry bearing on any particular registrant, it's my understanding that the

information may be disclosed provided the registrant is not identified as being in the registry.

MS. SADIN: Correct.

THE COURT: Okay. Then with that clarification, I think I can modify the language and hopefully make it a little bit simpler and clearer for people.

What I propose to say is as follows: Defendants are permanently enjoined from disclosing or disseminating to the public, either in printed or electronic form, the registry or registry information concerning a member of the due process class if the registry or registry information contains the name or other identifying information of the class member and identifying any member of the due process class as being included in the registry.

I realize it may be somewhat difficult for you to absorb that and reflect on its adequacy, but the intent is that the registry, as such, could not be publicly disclosed or disseminated and registry information could not be publicly disclosed or disseminated if it contained the name or other identifying information of the class member. Do you have any problem with that?

MS. SADIN: No. From the plaintiff's side, Your Honor, that sounds okay.

MS. CHAPPLE: I guess our concern, Your Honor, is that the order doesn't enjoin the Department of Public Safety from disclosing information in the Bureau of Identification of criminal history information that is available from sources other than the registry. And I think that was the agreement that both sides had. That that information, criminal history information, would still be available as long as it's not identified as being from the registry.

THE COURT: The order goes on. It says, "Provided nothing in this order will impair access to the registry by law enforcement agencies and officers," and they're specified, "to preclude law enforcement agencies and officers carrying out official duties from using information contained in the registry in specific criminal investigations and prosecutions so long as member of the due process class are not described to the public as being included in the registry."

Three: "Preclude law enforcement agencies and officers carrying out official duties from disclosure or

disseminating to the public information necessary to protect the public concerning a specific person so long as members of the due process class are not described to the public as being included in the registry."

Or, four -- and this is the point you mentioned. "Affect the public's ability to obtain individual criminal conviction history records pursuant to the applicable statutes."

The order would go on to require that defendants serve a copy of it on each local police department, law enforcement agency or other state or local entity to which it has transmitted registry information. And the order notes that each such department agency or entity is bound.

The order continues. "Pursuant to this order but without limitation of it, defendant shall immediately take down the registry website and cease making publicly available the registry or registry information maintained pursuant to the statute at local police department and state police troops."

All right?

MS. CHAPPLE: Your Honor, just for the record, I guess I'll state the obvious, which is we don't represent the municipal police departments. We can't -- I mean, we certainly will comply with Your Honor's order, but we can't make any representations as what their reaction will be to the order; whether they feel that the Court has jurisdiction to order them not to disclose this information. But we certainly will comply with the order, make them aware of the order.

THE COURT: Well, if you think that there might be some potential difficulty in that regard, it might be in their interest if somebody were to tell them that if they have notice of this order and they violate it, they might have a contempt problem on their hands and they probably shouldn't risk that without at least checking with counsel beforehand.

MS. CHAPPLE: Hopefully they would do that, Your Honor.

THE COURT: I would hope so.

I know that the defendants moved for a stay in papers that they submitted to us. And I'm not going to stay the order to give the defendants an opportunity to seek a

stay from the Court of Appeals. Ordinarily, I would do that in most cases if only to avoid imposing on counsel and the judges of the Court of Appeals unnecessarily.

However, in this situation, I think that I am faced with an extraordinary circumstance permitting no say.

What am I referring to? The correspondence that I received late yesterday tells me that a local television station has made a Freedom of Information Act request seeking a copy of the registry. I think that were I to grant a stay of my order to permit the defendants to seek a stay from the Court of Appeals, the freedom of information act request would complicate this situation very much for all concerned. And I think it's better to try to maintain the status quo, so-to-speak.

It's my understanding that the website can be taken down with a key stroke or two. And if the Court of Appeals should decide to stay my order or reverse it, the website can be reinstated with a key stroke or two.

MS. QUERIJERO: Your Honor, Carolyn Querijero, Deputy Attorney General. Can I just speak for a moment to the stay order?

The Attorney General isn't available at this moment, as I think you've been informed. He will be in about 15 minutes.

But we would really ask that you reconsider that and just enter a stay until Monday or make this order effective Monday. Your concerns about the Freedom of Information request, I think I can provide some assurance to you, under the Connecticut law, we have up to four business days to respond to the request. And we could certainly represent to you and assure you that we would not respond to it before Tuesday morning. So if we could have a stay until Monday or have the order take effect on Monday to enable us to get our State papers ready and file them with the Second Circuit, we would -- you know, we would ask for that.

THE COURT: All right. I have given careful consideration to this matter. And I don't think a stay is warranted. The defendants have made statements to me and to the public that the decision is plainly wrong and exceedingly dangerous. I think those statements are hyperbole at best. I have thought carefully about the

potential consequences of this order. And I see no danger to the public whatsoever.

If, as the Attorney General has been telling people, the order might imperil school children because a sex offender might move in next door without notice, then I would urge the Attorney General to tell the people involved in law enforcement to be more alert. They are free to continue to check the registry on a daily, indeed hourly, basis. And if they see that somebody has moved in across the street from a school, nothing in the order prevents them from warning everyone in that school Nothing prevents them from going to that offender and making plain the law enforcement interest and seeing to it that those children are protected.

What the order prevents is public disclosure of that individual's inclusion in the registry and his registry information identified as such.

Consequently, I think you'll see that I give little or no weight to the in terrorem arguments that have been made to me and broadcast widely to the public.

In fact, as a result of all that, your arguments lack credibility with me. And for that reason, too, I deny the request.

Is there anything further?

MS. QUERIJERO: No. Just to note our objection for the record, Your Honor.

MS. CHAPPLE: Your Honor, two brief matters.

One is that I'm not so sure that the website can be taken down as easily as Your Honor has suggested. The State Police in anticipation of the order has begun preparing. We will notify the Court soon when they expect to be able to have it down, especially if they anticipate any delay. But we've been led to believe that it's not as simple as Your Honor has suggested.

THE COURT: Well, I don't claim to be an expert, but I have advisors who seem to be knowledgeable in the area and they tell me that it can be done quickly and inexpensively. If you have any problems, I would appreciate learning about it and I would urge you to please err on the side of informing me because I am concerned that the order be complied with, all right?

MS. CHAPPLE: Yes, Your Honor.

I was wondering if you could tell us the date when the motion for class certification was granted. If it was the 15th or some time after that.

THE COURT: We can treat it granted as of today on the record in this conference.

MS. CHAPPLE: Thank you, Your Honor.

THE COURT: Anything further?

MS. SADIN: No, sir. Just if the defendant would also keep the plaintiffs appraised of any difficulties with the website. My concern is that everybody's out there trying to -- sort of like the Napster case -- download it right away.

THE COURT: All right.

MS. SADIN: In anticipation of an order. So the quicker it comes down, I think that's a very important point.

MS. CHAPPLE: We will represent to the Court that we'll advise the Department of Public Safety to make every effort to get it down immediately, as soon as it's possible.

THE COURT: All right. Thank you all.

MS. SADIN: Thank you, sir.

REGISTRATION OF SEXUAL OFFENDERS

Sec. 54-250. Definitions. For the purposes of sections 54-102g and 54-250 to 54-259, inclusive:

(1) "Conviction" means a judgment entered by a court upon a plea of guilty, a plea of nolo contendere or a finding of guilty by a jury or the court notwithstanding any pending appeal or habeas corpus proceeding arising from such judgment.

(2) "Criminal offense against a victim who is a minor" means (A) a violation of subdivision (2) of Section 53-21, subdivision (2) of subsection (a) of section 53a-70, subdivision (2), (4) or (8) of subsection (a) of section 53a-71, subdivision (2) of subsection (a) of section 53a-72a, subdivision (2) of subsection (a) of section 53a-86, subdivision (2) of subsection (a) of section 53a-87, section 53a-196a, 53a-196b, 53a-196c or 53a-196d, (B) a violation of section 53a-92, 53a-92a, 53a-94, 53a-94a, 53a-95, 53a-96 or 53a-186, provided the court makes a finding that, at the time of the offense, the victim was under eighteen years of age, (C) a violation of any of the offenses specified in subparagraph (A) or (B) of this subdivision for which a person is criminally liable under section 53a-8, 53a-48 or 53a-49, or (D) a violation of any predecessor statute to any offense specified in subparagraph (A), (B) or (C) of this subdivision the essential elements of which are substantially the same as said offense.

(3) "Identifying factors" means fingerprints, a photographic image, and a description of any other identifying characteristics as may be required by the Commissioner of Public Safety. The commissioner shall also require a sample of the registrant's blood taken for DNA (deoxyribonucleic acid) analysis, unless such sample has been previously obtained in accordance with section 54-102g.

(4) "Mental abnormality" means a congenital or acquired conditions of a person that affects the emotional or volitional capacity of the person in a manner that

predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(5) "Nonviolent sexual offense" means a violation of section 53a-73a.

(6) "Not guilty by reason of mental disease or defect" means a finding by a court or jury of not guilty by reason of mental disease or defect pursuant to section 53a-13 notwithstanding any pending appeal or habeas corpus proceeding arising from such finding.

(7) "Personality disorder" means a condition as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association.

(8) "Registrant" means a person required to register under section 54-251, 54-252, 54-253 or 54-254.

(9) "Registry" means a central record system in this state, any other state or the federal government that receives, maintains and disseminates information on persons convicted or found not guilty by reason of mental disease or defect of criminal offenses against victims who are minors, nonviolent sexual offenses, sexually violent offenses and felonies found by the sentencing court to have been committed for a sexual purpose.

(10) "Release into the community" means, with respect to a conviction or a finding of not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor, a nonviolent sexual offense, a sexually violent offense or a felony found by the sentencing court to have been committed for a sexual purpose, (A) any release by a court after such conviction or finding of not guilty by reason of mental disease or defect, a sentence of probation or any other sentence under section 53a-28 that does not result in the offender's immediate placement in the custody of the Commissioner of Correction; (B) release from a correctional facility at the discretion of the Board of

Parole, by the Department of Correction to a program authorized by section 18-100c or upon completion of the maximum term or terms of the offender's sentence or sentences, or to the supervision of the office of Adult Probation in accordance with the terms of the offender's sentence; or (C) release from a hospital for mental illness or a facility for persons with mental retardation by the Psychiatric Security Review Board on conditional release pursuant to section 17a-588 or upon termination of commitment to the Psychiatric Security Review Board.

(11) "sexually violent offense" means (A) a violation of section 53a-70, except subdivision (2) of subsection (a) of said section, 53a-70a, 53a-70b, 53a-71, except subdivision (1), (4) or (8) of subsection (a) of said section, 53a-72a, except subdivision (2) of subsection (a) of said section, or 53a-72b, or of section 53a-92 or 53a-92a, provided the court makes a finding that the offense was committed with intent to sexually violate or abuse the victim, (B) a violation of any of the offenses specified in subparagraph (A) of this subdivision for which a person is criminally liable under section 53a-8, 53a-48 or 53a-49, or (C) a violation of any predecessor statute to any of the offenses specified in subparagraph (a) or (B) of this subdivision the essential elements of which are substantially the same as said offense.

(12) "Sexual purpose" means that a purpose of the defendant in committing the felony was to engage in sexual contact or sexual intercourse with another person without that person's consent. A sexual purpose need not be the sole purpose of the commission of the felony. The sexual purpose may arise at any time in the course of the commission of the felony.

Sec. 54-251. Registration of person who has committed a criminal offense against a victim who is a minor or a nonviolent sexual offense. (a) Any person who has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor or a nonviolent sexual offense, and is released into the community on or after October 1, 1998, shall, within three days following such release, and whether or not such person's place of residence is in this state, register such person's name, identifying factors, criminal history record and residence address with the Commissioner of Public Safety, on such forms and in such locations as the commissioner shall direct, and shall maintain such registration for ten years except that any person who has one or more prior convictions of any such offense or who is convicted of a violation of subdivision (2) of subsection (a) of section 53a-70 shall maintain such registration for life. Prior to accepting a plea of guilty or nolo contendere from a person with respect to a criminal offense against a victim who is a minor or a nonviolent sexual offense, the court shall (1) inform the person that the entry of a finding of guilty after section 53a-70 shall maintain such registration for life. Prior to accepting a plea of guilty or nolo contendere from a person with respect to a criminal offense against a victim who is a minor or a nonviolent sexual offense, the court shall (1) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (2) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. If any person who is subject to registration under this section regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall notify the Commissioner of Public Safety and shall also register with an appropriate agency in that state provided that state has a registration requirement for such

offenders. During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Public Safety.

(b) Notwithstanding the provisions of subsection (a) of this section, the court may exempt any person who has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (1) of subsection (a) of section 53a-71 from the registration requirements of this section if the court finds that such person was under nineteen years of age at the time of the offense and that registration is not required for public safety.

(c) Notwithstanding the provisions of subsection (a) of this section, the court may exempt any person who has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (2) of subsection (a) of section 53a-73a from the registration requirements of this section if the court finds that registration is not required for public safety.

(d) Any person who violates the provisions of this section shall be guilty of a class D felony.

Sec. 54-252. Registration of person who has committed a sexually violent offense.

(a) Any person who has been convicted or found not guilty by reason of mental disease or defect of a sexually violent offense, and (1) is released into the community on or after October 1, 1988, and prior to October 1, 1998, and resides in this state, shall, on October 1, 1998, or within three days of residing in this state, whichever is later, or (2) is released into the community on or after October 1, 1998, shall, within three days following such release, register such person's name, identifying factors, criminal history record, documentation of any treatment received for mental abnormality or personality disorder, and residence address with the Commissioner of Public Safety on such forms and in such locations as said commissioner shall direct, and shall maintain such registration for life. Prior to accepting a plea of guilty or nolo contendere from a person with respect to a sexually violent offense, the court shall (A) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (B) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another requirements of this section, and (B) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. If any person who is subject to registration under this section regularly travels into or within another

state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall notify the Commissioner of Public Safety and shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Public Safety.

(b) Any person who has been subject to the registration requirements of section 54-102r of the general statutes, revised to January 1, 1997, as amended by section 1 of public act 97-183, shall, not later than three working days after October 1, 1998, register under this section and thereafter comply with the provisions of sections 54-102g and 54-250 to 54-259, inclusive.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, during the initial registration period following October 1, 1998, the Commissioner of Public Safety may phase in completion of the registration procedure for persons released into the community prior to said date over the first three months following said date, and no such person shall be prosecuted for failure to register under this section during those three months provided such person complies with the directives of said commissioner regarding registration procedures.

(d) Any person who violates the provisions of this section shall be guilty of a class D felony.

Section 54-253. Registration of person who has committed a sexual offense in another jurisdiction. (a) Any person who has been convicted or found not guilty by reason of mental disease or defect in any other state, in a federal or military court or in any foreign jurisdiction of any crime, the essential elements of which are substantially the same as any of the crimes specified in subdivisions (2), (5) and (11) of section 54-250 and who resides in this state on and after October 1, 1998, shall, within ten days of residing in this state, register with the Commissioner of Public Safety in the same manner as if such person had been convicted or found not guilty by reason of mental disease or defect of such crime in this state, except that for purposes of determining the ten-year period of registration under section 54-251 such person shall be deemed to have initially registered on the date of such person's release into the community in such other state, federal or military system or foreign jurisdiction.

(b) Any person not a resident of this state who is registered as a sexual offender under the laws of any other state and who regularly travels into or within this state or temporarily resides in this state for purposes including, but not limited to employment or schooling shall, within three days after the offender under the laws of any other state and who regularly travels into or within this state or temporarily resides in this state for purposes including, but not limited to employment or schooling shall, within three days after the commencement of such travel or residence in this state, register such person's name, identifying factors, criminal history record, locations visited on a recurring basis or residence address, if any, in this state, and residence address in such person's home state with the Commissioner of Public Safety on such forms and in such locations as said commissioner shall direct and shall maintain such registration until such travel or residence terminates or until

such person is released from registration as a sexual offender in such other state. If such person terminates such person's travel or residence in this state or changes such person's address in this state such person shall, within five days, provide notice in writing to the Commissioner of Public Safety.

(c) Any person who violates the provisions of this section shall be guilty of a class D felony.

Sec. 54-254. Registration of person who has committed a felony for a sexual purpose. (a) Any person who has been convicted or found not guilty by reason of mental disease or defect in this state on or after October 1, 1998, of any felony that the court finds was committed for a sexual purpose, may be required by the court upon release into the community to register such person's name, identifying factors, criminal history record and residence address with the Commissioner of Public Safety, on such forms and in such locations as the commissioner shall direct, and to maintain such registration for ten years. If the court finds that a person has committed a felony for a sexual purpose and intends to require such person to register under this section, prior to accepting a plea of guilty or nolo contendere from such person with respect to such felony, the court shall (1) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (2) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. If any person who is subject to registration under this section regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall notify the Commissioner of Public Safety and shall also register with

an appropriate agency in that state, provided that state has a registration requirement for such offenders. During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Public Safety.

(b) Any person who violates the provisions of this section shall be guilty of a class D felony.

Sec. 54-255. Restriction on dissemination of registration information for certain offenders. (a) Upon the conviction or finding of not guilty by reason of mental disease or defect of any person for a violation of section 53a-70b, the court may order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, provided the court finds that dissemination of the registration information is not required for public safety and that publication of the registration information would be likely to reveal the identity of the victim within the community where the victim resides. The court shall remove the restriction on the dissemination of such registration information if, at any time, the court finds that public safety requires that such person's registration information be made available to the public or that a change of circumstances makes publication of such registration information no longer likely to reveal the identity of the victim within the community where the victim resides. Prior to ordering or removing the restriction on the such person's registration information be made available to the public or that a change of circumstances makes publication of such registration information no longer likely to reveal the identity of the victim within the community where the victim resides. Prior to ordering or removing the restriction on the dissemination of such person's registration information, the court shall consider any information or statements provided by the victim.

(b) Upon the conviction or finding of not guilty by reason of mental disease or defect of any person of a criminal offense against a victim who is a minor, a nonviolent sexual offense or a sexually violent offense, where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in

section 46b-21, the court may order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, provided the court finds that dissemination of the registration information is not required for public safety and that publication of the registration information would be likely to reveal the identity of the victim within the community where the victim resides. The court shall remove the restriction on the dissemination of such registration information if, at any time, it finds that public safety requires that such person's registration information be made available to the public or that a change in circumstances makes publication of the registration information no longer likely to reveal the identity of the victim within the community where the victim resides.

(c) Any person who: (1) Has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (1) of subsection (a) of section 53a-71 between October 1, 1988, and June 30, 1999, and was under nineteen years of age at the time of the offense; (2) has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (2) of subsection (a) of section 53a-73a between October 1, 1988, and June 30, 1999; (3) has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor, a nonviolent sexual offense or a sexually violent offense, between October 1, 1988, and June 30, 1999, where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in section 46b-21; (4) has been convicted or found not guilty by reason of mental disease or defect of a violation of section 53a-70b between October 1, 1988, and June 30, 1999; or (5) has been convicted or found not

guilty by reason of mental disease or defect of any crime between October 1, 1988, and September 30, 1998, which requires registration under sections 54-250 to 54-259, inclusive, and (A) served no jail or prison time as a result of such conviction or finding of not guilty by reason of mental disease or defect, (B) has not been subsequently convicted or found not guilty by reason of mental disease or defect of any crime which would require registration under sections 54-250 to 54-259, inclusive, and (C) has registered with the Department of Public Safety in accordance with sections 54-250 to 54-259, inclusive; may petition the court to order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, provided the court finds that dissemination of the registration information is not required for public safety.

Sec. 54-256. Responsibilities of courts and agencies in registration process. Any court, the Commissioner of Correction or the Psychiatric Security Review Board, prior to releasing into the community any person convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor, a nonviolent sexual offense, a sexually violent offense or a felony found by the sentencing court to have been committed for a sexual purpose, except a person being released unconditionally at the conclusion of such person's sentence or commitment, shall require as a condition of such release that such person complete the registration procedure established by the Commissioner of Public Safety under sections 54-251, 54-252 and 54-254. The court, the Commissioner of Correction or the Psychiatric Security Review Board, as the case may be, shall provide the person with a written summary of the person's obligations under sections 54-102g and 54-250 to 54-259, inclusive, and transmit the completed registration package to the Commissioner of Public Safety who shall enter the information into the registry established under section 54-257. If a court transmits the completed registration package to the Commissioner of Public Safety with respect to a person released by the court, such package need not include identifying factors for such person. In the case of a person being released unconditionally who declines to complete the 54-257. If a court transmits the completed registration package to the Commissioner of Public Safety with respect to a person released by the court, such package need not include identifying factors for such person. In the case of a person being released unconditionally who declines to complete the registration package through the court or the releasing agency, the court or agency shall: (1) Except with respect to information that is not available to the public pursuant to court order, rule of court or any provision of the general statutes, provide to the

Commissioner of Public Safety the person's name, date of release into the community, anticipated residence address, if known, criminal history record, any known treatment history and any other relevant information; (2) inform the person that such person has an obligation to register within three days with the Commissioner of Public Safety for a period of ten years following the date of such person's release or for life, as the case may be, and that if such person changes such person's address such person shall within five days register the new address in writing with the Commissioner of Public Safety and, if the new address is in another state or if such person regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders; (3) provide the person with a written summary of the person's obligations under sections 54-102g and 54-250 to 54-259, inclusive, as explained to the person under subdivision (2) of this section; and (4) make a specific notation on the record maintained by that agency with respect to such person that the registration requirements were explained to such person and that such person was provided with a written summary of such person's obligations under sections 54-102g and 54-250 to 54-259, inclusive.

Sec. 54-257. Registry. Suspension of registration. Verification of address. (a) The Department of Public Safety shall, not later than January 1, 1999, establish and maintain a registry of all persons required to register under sections 54-251, 54-252, 54-253 and 54-254. The department shall, in cooperation with the Office of the Chief Court Administrator, the Department of Correction and the Psychiatric Security Review Board, develop appropriate forms for use by agencies and individuals to report registration information, including changes of address. Upon receipt of registration information, the department shall enter the information into the registry and notify the local police department or state police troop having jurisdiction where the registrant resides or plans to reside. If a registrant reports a residence in another state, the department shall notify the state police agency of that state or such other agency in that state that maintains registry information, if known. The department shall also transmit all registration information, conviction data, photographic images and fingerprints to the Federal Bureau of Investigation in such form as said bureau shall require for inclusion in a national registry.

(b) The Department of Public Safety may suspend the registration of any person registered under section 54-251, 54-252, 54-253 or 54-254 while such under civil commitment or residing outside this state. During the period that such registration is under suspension, the department is not required to verify the address of the registrant pursuant to subsection (c) of this section and may withdraw the registration information from public access. Upon the release of the registrant from incarceration or civil commitment or resumption of residency in this state by the registrant, the department shall reinstate the registration, redistribute the registration information in accordance with subsection (a) of this section and resume verifying the

address of the registrant in accordance with subsection (c) of this section. Suspension of registration shall not affect the date of expiration of the registration obligation of the registrant under section 54-251, 54-252 or 54-253.

(c) Except as provided in subsection (b) of this section, the Department of Public Safety shall verify the address of each registrant by mailing a nonforwardable verification form to the registrant at the registrant's last reported address. Such form shall require the registrant to sign a statement that the registrant continues to reside at the registrant's last reported address and return the form by mail by a date which is ten days after the date such form was mailed to the registrant. The form shall contain a statement that failure to return the form or providing false information is a violation of section 54-251, 54-252, 54-253 or 54-254, as the case may be. Each person required to register under section 54-251 or 54-254 shall have such person's address verified in such manner annually on the anniversary of such person's initial registration date. Each person required to register under section 54-252 shall have such person's address verified in such manner every ninety days after such person's initial registration date. Each person required to register under section 54-253 shall have such person's address verified in such manner either annually on the anniversary of such person's initial registration date or every ninety days after such person's initial registration date depending upon whether, after such initial registration, such person is subject to the requirements of section 54-251 or section 54-252, respectively. In the event that a registrant fails to return the address verification form, the Department of Public Safety shall notify the local police department or the state police troop having jurisdiction over the registrant's last reported address, and that agency shall apply for a warrant to be issued for the registrant's arrest under

section 54-251, 54-252, 54-253 or 54-254, as the case may be. The Department of Public Safety shall not verify the address of registrants whose last reported address was outside this state.

(d) The Department of Public Safety shall retake the photographic image of each registrant at least once every five years.

Sec. 54-258. Availability of registration information. Immunity. (a)(1) Notwithstanding any other provision of the general statutes, except subdivisions (3) and (4) of this subsection, the registry maintained by the Department of Public Safety shall be a public record and shall be accessible to the public during normal business hours. The Department of Public Safety shall make registry information available to the public through the Internet. Not less than once per calendar quarter, the Department of Public Safety shall issue notices to all print and electronic media in the state regarding the availability and means of accessing the registry. Each local police department and each state police troop shall keep a record of all registration information transmitted to it by the Department of Public Safety, and shall make such information accessible to the public during normal business hours.

(2) Any state agency, the Judicial Department, any state police troop or any local police department may, at its discretion, notify any government agency, private organization or individual of registration information when such agency, said department, such troop or such local police department, as the case may be, believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration under private organization or individual of registration information when such agency, said department, such troop or such local police department, as the case may be, believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration under section 54-251, 54-252, 54-253 or 54-254.

(3) Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, state agencies, the Judicial Department, state police troops and local police

departments shall not disclose the identity of any victim of a crime committed by a registrant or treatment information provided to the registry pursuant to sections 54-102g and 54-250 to 54-259, inclusive, except to government agencies for bona fide law enforcement or security purposes.

(4) Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, registration information the dissemination of which has been restricted by court order pursuant to section 54-255 and which is not otherwise subject to disclosure, shall not be a public record and shall be released only for law enforcement purposes until such restriction is removed by the court pursuant to said section.

(5) When any registrant completes the registrant's term of registration or is otherwise released from the obligation to register under section 54-251, 54-252, 54-253 or 54-254, the Department of Public Safety shall notify any state police troop or local police department having jurisdiction over the registrant's last reported residence address that the person is no longer a registrant, and the Department of Public Safety, state police troop and local police department shall remove the registrant's name and information from the registry.

(b) Neither the state nor any political subdivision of the state nor any officer or employee thereof, shall be held civilly liable to any registrant by reason of disclosure of any information regarding the registrant that is released or disclosed in accordance with subsection (a) of this section. The state and any political subdivision of the state and, except in cases of wanton, reckless or malicious conduct, any officer or employee thereof, shall be immune from liability for good faith conduct in carrying out the provisions of subdivision (2) of subsection (a) of this section.

Sec. 54-258a. Warning against wrongful use of registry information. Any agency of the state or any political subdivision thereof that provides public access to information contained in the registry shall post a warning that states: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." Such warning shall be in a suitable size and location to ensure that it will be seen by any person accessing registry information.

Sec. 54-259. Sexual Offender Registration Committee. (a) There is established a Sexual Offender Registration Committee consisting of the following members or their designees: The Chief Court Administrator, the Chief State's Attorney, the Commissioner of Public Safety, the Commissioner of Correction, the Secretary of the Office of Policy and Management, the chairman of the Psychiatric Security Review Board, the chairman of the Board of Parole, the director of the Office of Adult Probation, the President of the Connecticut Police Chiefs Association and two persons appointed by the Governor, one of whom shall be involved in the delivery of services to victims of sexual assault and one of whom shall be involved in the delivery of services to victims of crime. The Chief Court Administrator shall serve as chairperson of the committee. The Office of Policy and Management shall, within available resources, provide staff resources to the committee.

(b) On or before January 15, 1999, the Sexual Offender Registration Committee shall submit a report to the Governor and the General Assembly. Such report shall make recommendations concerning the implementation of sections 54-102g and 54-250 to 54-259, inclusive, and shall address issues including (1) assuring interagency coordination to maximize the accuracy and timeliness of shall submit a report to the Governor and the General Assembly. Such report shall make recommendations concerning the implementation of sections 54-102g and 54-250 to 54-259, inclusive, and shall address issues including (1) assuring interagency coordination to maximize the accuracy and timeliness of information contained in the registry, (2) complying with other applicable state and federal laws and regulations, (3) establishing a procedure by which registrants may apply to the sentencing court, not sooner than ten years after initial registration, to be relieved of their obligation to register, (4) establishing a board of

experts in the behavior and treatment of sexual offenders, to examine such applicants and make recommendations to the court in accordance with section 54-255, (5) developing guidelines for the state police and municipal police departments that shall set forth the circumstances in which individuals, private organizations and government agencies in their respective jurisdictions should be directly notified that a person subject to registration under sections 54-102g and 54-250 to 54-259, inclusive, is residing near their locations, and (6) any other fiscal, legislative and programmatic matters which affect the successful implementation of the registry.

Sec. 54-260. (Formerly Sec. 54-102s). Notification of change of address of sexual offenders on parole or probation. (a) For the purposes of this section, "sexual offender" means any person convicted of a violation of subdivision (2) of section 53-21, section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b committed on or after October 1, 1995.

(b) Any sexual offender who is released from a correctional institution on parole or who is sentenced to a period of probation shall, during the period of such parole or probation and as a condition of such parole or probation, immediately notify his parole officer or probation officer, as the case may be, whenever he changes his residence address. Each parole officer or probation officer who is notified of such change of address shall notify the chief of police of the police department or resident state trooper for the municipality of the new address of the parolee or probationer and any other law enforcement official he deems appropriate.

(c) Nothing in this section shall be construed to prohibit a parole officer or probation officer acting in the performance of his duties and within the scope of his employment from disclosing any information concerning the parolee or probationer to any person whenever he deems such disclosure to be appropriate.

Sec. 54-261. Community response education program. (a) The Office of Adult Probation, in conjunction with state-wide experts in law enforcement, the treatment of sexual offenders and sexual assault victim services, shall, within available appropriations, develop a community response education program to be offered to neighborhoods and municipalities that have been notified pursuant to section 54-258 that a person who has registered under said section is or will be residing in that community.

(b) The purpose of such program shall be to assist neighborhoods, parents and children to learn how to better protect themselves from sexual abuse and sexual assault. The program shall develop educational materials and community information resources on prevention and risk reduction concerning sexual abuse and sexual assault and the enforcement of requirements concerning the registration and supervision of sexual offenders and the notification of communities where such offenders reside.

(c) The program may include the following:

(1) An initial community meeting following a community notification, sponsored by the Office of Adult Probation and held in conjunction with the chief of police, chief elected officials, the superintendent of schools and other municipal officials of the community, to discuss the implementation of the statutory requirements concerning the registration of a sexual offender and the notification of the community where such offender resides, to provide information on the crime or crimes involved and to provide information on how the offender will be monitored by the Office of Adult Probation and the specific conditions of probation applicable to the offender;

(2) Information on how and where concerned residents may report observed violations by an offender of the conditions of such offender's probation;

(3) Resources to educate families and children in the prevention and avoidance of sexual abuse and sexual assault and for parents seeking supportive methods for discussing relevant issues with their children;

(4) Resources on when and how a community may wish to establish a network of "Safe Houses" for neighborhood children to use when they seek safe shelter or the creation of a neighborhood block watch or crime watch;

(5) Resources for police departments and boards of education to use in consulting with parents on appropriate school-based classroom programs stressing safety, prevention and risk reduction and to use in developing educational programs for parents to discuss relevant issues with their children;

(6) Compilation and distribution of a list of child protective agencies, child guidance clinics and rape crisis centers for families seeking more in-depth counseling after a community notification has occurred.

(d) The Office of Adult Probation may apply for and receive grants from the federal government or any agency thereof or from any foundation, corporation, association or individual for purposes of the development of the community response education program under this section.

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(a) In general.

(1) State guidelines. The Attorney General shall establish guidelines for State programs that require--

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of subsection (b)(6); and

(B) a person who is a sexually violent predator to register a current address unless such requirement is terminated under subparagraph (B) of subsection (b)(6).

(2) Determination of sexually violent predator status; waiver; alternative measures.

(A) In general. A determination of whether a person is a sexually violent predator for purposes of this section shall be made by a court after considering the recommendation of a board composed of experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies.

(B) Waiver. The Attorney General may waive the requirements of subparagraph (A) if the Attorney General determines that the State has established alternative procedures or legal standards for designating a person as a sexually violent predator.

(C) Alternative measures. The Attorney General may also approve alternative measures of comparable or

greater effectiveness in protecting the public from unusually dangerous or recidivistic sexual offenders in lieu of the specific measures set forth in this section regarding sexually violent predators

(3) Definitions. For purposes of this section:

(A) The term "criminal offense against a victim who is a minor" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the following range of offenses:

(i) kidnapping of a minor, except by a parent;
(ii) false imprisonment of a minor, except by a parent;
(iii) criminal sexual conduct toward a minor;
(iv) solicitation of a minor to engage in sexual conduct;
(v) use of a minor in a sexual performance;
(vi) solicitation of a minor to practice prostitution;
(vii) any conduct that by its nature is a sexual offense against a minor; or
(viii) an attempt to commit an offense described in any of clauses (i) through (vii), if the State--

(I) makes such an attempt a criminal offense; and
(II) chooses to include such an offense in those which are criminal offenses against a victim who is a minor for the purposes of this section.

For purposes of this subparagraph conduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger.

(B) The term "sexually violent offense" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the range of

offenses encompassed by aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code, or as described in the State criminal code) or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of title 18, United States Code, or as described in the State criminal code).

(C) The term "sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

(D) The term "mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(E) The term "predatory" means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(F) The term "employed, carries on a vocation" includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(G) The term "student" means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary

school, trade, or professional institution, or institution of higher education.

(b) Registration requirement upon release, parole, supervised release, or probation. An approved State registration program established under this section shall contain the following elements:

(1) Duties of responsible officials.

(A) If a person who is required to register under this section is released from prison, or placed on parole, supervised release, or probation, a State prison officer, the court, or another responsible officer or official, shall--

(i) inform the person of the duty to register and obtain the information required for such registration;

(ii) inform the person that if the person changes residence address, the person shall report the change of address as provided by State law;

(iii) inform the person that if the person changes residence to another State, the person shall report the change of address as provided by State law and comply with any registration requirement in the new State of residence, and inform the person that the person must also register in a State where the person is employed, carries on a vocation, or is a student;

(iv) obtain fingerprints and a photograph of the person if these have not already been obtained in connection with the offense that triggers registration; and

(v) require the person to read and sign a form stating that the duty of the person to register under this section has been explained.

(B) In addition to the requirements of subparagraph (A), for a person required to register under subparagraph (B) of subsection (a)(1), the State case may be, shall obtain

the name of the person, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person.

(2) Transfer of information to State and FBI; participation in national sex offender registry.

(A) State reporting. State procedures shall ensure that the registration information is promptly made available to a law enforcement agency having jurisdiction where the person expects to reside and entered into the appropriate State records or data system. State procedures shall also ensure that conviction data and fingerprints for persons required to register are promptly transmitted to the Federal Bureau of Investigation.

(B) National reporting. A State shall participate in the national database established under section 170102(b) [42 USCS § 14072(b)] in accordance with guidelines issued by the Attorney General, including transmission of current address information and other information on registrants to the extent provided by the guidelines.

(3) Verification.

(A) For a person required to register under subparagraph (A) of subsection (a)(1), State procedures shall provide for verification of address at least annually.

(i)--(iv) [Deleted]

(B) The provisions of subparagraph (A) shall be applied to a person required to register under subparagraph (B) of subsection (a)(1), except that such person must verify the registration every 90 days after the date of the initial release or commencement of parole.

(4) Notification of local law enforcement agencies of changes in address. A change of address by a person required to register under this section shall be reported by the person in the manner provided by State law. State procedures shall ensure that the updated address information is promptly made available to a law enforcement agency having jurisdiction where the person will reside and entered into the appropriate State records or data system.

(5) Registration for change of address to another state. A person who has been convicted of an offense which requires registration under this section and who moves to another State, shall report the change of address to the responsible agency in the State the person is leaving, and shall comply with any registration requirement in the new State of residence. The procedures of the State the person is leaving shall ensure that notice is provided promptly to an agency responsible for registration in the new State, if that State requires registration.

(6) Length of registration. A person required to register under subsection (a)(1) shall continue to comply with this section, except during ensuing periods of incarceration, until--

(A) 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation; or

(B) for the life of that person if that person--

(i) has 1 or more prior convictions for an offense described in subsection(a)(1)(A); or

(ii) has been convicted of an aggravated offense described in subsection(a)(1)(A); or

(iii) has been determined to be a sexually violent predator pursuant to subsection (a)(2)

(7) Registration of out-of-State offenders, Federal offenders, persons sentenced by courts martial, and offenders crossing State borders. As provided in guidelines issued by the Attorney General, each State shall include in its registration program residents who were convicted in another State and shall ensure that procedures are in place to accept registration information from--

(A) residents who were convicted in another State, convicted of a Federal offense, or sentenced by a court martial; and

(B) nonresident offenders who have crossed into another State in order to work or attend school.

(c) Registration of offender crossing State border. Any person who is required under this section to register in the State in which such person resides shall also register in any State in which the person is employed, carries on a vocation, or is a student.

(d) Penalty. A person required to register under a State program established pursuant to this section who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed.

(e) Release of information.

(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.

(2) The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

(f) Immunity for good faith conduct. Law enforcement agencies, employees of law enforcement agencies and independent contractors acting at the direction of such agencies, and State officials shall be immune from liability for good faith conduct under this section.

(g) Compliance.

(1) Compliance date. Each State shall have not more than 3 years from the date of enactment of this Act [enacted Sept. 13, 1994] in which to implement this section, except that the Attorney General may grant an additional 2 years to a State that is making good faith efforts to implement this section.

(2) Ineligibility for funds.

(A) A State that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3765).

(B) Reallocation of funds. Any funds that are not allocated for failure to comply with this section shall be reallocated to States that comply with this section.

(h) Fingerprints. Each requirement to register under this section shall be deemed to also require the submission of a set of fingerprints of the person required to register, obtained in accordance with regulations prescribed by the Attorney General under section 170102(h) [42 USCS § 14072(h)].

(i) Grants to States for costs of compliance.

(1) Program authorized.

(A) In general. The Director of the Bureau of Justice Assistance (in this subsection referred to as the "Director") shall carry out a program, which shall be known as the "Sex Offender Management Assistance Program" (in this subsection referred to as the "SOMA program"), under which the Director shall award a grant to each eligible State to offset costs directly associated with complying with this section.

(B) Uses of funds. Each grant awarded under this subsection shall be--

(i) distributed directly to the State for distribution to State and local entities; and

(ii) used for training, salaries, equipment, materials, and other costs directly associated with complying with this section.

(2) Eligibility.

(A) Application. To be eligible to receive a grant under this subsection, the chief executive of a State shall, on an annual basis, submit to the Director an application (in such form and containing such information as the Director may reasonably require) assuring that--

(i) the State complies with (or made a good faith effort to comply with) this section; and

(ii) where applicable, the State has penalties comparable to or greater than Federal penalties for crimes listed in this section, except that the Director may waive the requirement of this clause if a State demonstrates an overriding need for assistance under this subsection.

(B) Regulations.

(i) In general. Not later than 90 days after the date of enactment of this subsection [enacted Oct. 30, 1998], the Director shall promulgate regulations to implement this subsection (including the information that must be included and the requirements that the States must meet) in submitting the applications required under this subsection. In allocating funds under this subsection, the Director may consider the annual number of sex offenders registered in each eligible State's monitoring and notification programs.

(ii) Certain training programs. Prior to implementing this subsection, the Director shall study the feasibility of incorporating into the SOMA program the activities of any technical assistance or training program established as a result of section 40152 of this Act [42 USCS § 13941]. In a case in which incorporating such activities into the SOMA program will eliminate duplication of efforts or administrative costs, the Director shall take administrative actions, as allowable, and make recommendations to Congress to incorporate such activities into the SOMA program prior to implementing the SOMA program.

(3) Authorization of appropriations. There is authorized to be appropriated to carry out this subsection, $ 25,000,000 for each of fiscal years 1999 and 2000.

42 U.S.C. 3756 Allocation and distribution of funds under formula grants (a) Subject to subsection (f), of the total amount appropriated for this part [42 USCS §§ 3750 et seq.] in any fiscal year, the amount remaining after setting aside the amount required to be reserved to carry out section 511 of this title [42 USCS § 3761] shall be set aside for section 502 [42 USCS § 3752] and allocated to States as follows:

(1) $ 500,000 or 0.25 percent, whichever is greater, shall be allocated to each of the participating States; and

(2) of the total funds remaining after the allocation under paragraph (1), there shall be allocated to each State an amount which bears the same ratio to the amount of remaining funds described in this paragraph as the population of such State bears to the population of all the States.

(b)(1) Each State which receives funds under subsection (a) of this section in a fiscal year shall distribute among units of local government, or combinations of units of local government, in such State for the purposes specified in section 501(b) [42 USCS § 3751(b)] that portion of such funds which bears the same ratio to the aggregate amount of such funds as the amount of funds expended by all units of local government for criminal justice in the preceding fiscal year bears to the aggregate amount of funds expended by the State and all units of local government in such State for criminal justice in such preceding fiscal year.

(2) In distributing funds received under this part among urban, rural, and suburban units of local government and combinations thereof, the State shall give priority to those jurisdictions with the greatest need.

(3) Any funds not distributed to units of local government under paragraph (2) shall be available for expenditure by the State involved.

(4) For purposes of determining the distribution of funds under paragraphs (1) and (2), the most accurate and complete data available for the fiscal year involved shall be used. If data for such fiscal year are not available, then the most accurate and complete data available for the most recent fiscal year preceding such fiscal year shall be used.

(c) No funds allocated to a State under subsection (a) or received by a State for distribution under subsection (b) may be distributed by the Director or by the State involved for any program other than a program contained in an approved application.

(d) If the Director determines, on the basis of information available during any fiscal year, that a portion of the funds allocated to a State for that fiscal year will not be required or that a State will be unable to qualify or receive funds under section 502 [42 USCS § 3752], or that a State chooses not to participate in the program established under such section, then such portion shall be awarded by the Director to urban, rural, and suburban units of local government or combinations thereof within such State giving priority to those jurisdictions with greatest need.

(e) Any funds allocated under subsection (a) or (f) that are not distributed under this section shall be available for obligation under subpart 2 [42 USCS §§ 3760 et seq.].

(f) (1) For any fiscal year beginning more than 2 years after the effective date of this subsection--

(A) 90 percent of the funds allocated under subsection (a) without regard to this subsection to a State

described in paragraph (2) shall be distributed by the Director to such State; and

(B) 10 percent of such funds shall be allocated equally among States that are not affected by the operation of subparagraph (A).

(2) Paragraph (1)(A) refers to a State that does not have in effect, and does not enforce, in such fiscal year, a law that requires the State at the request of the victim of a sexual act--

(A) to administer, to the defendant convicted under State law of such sexual act, a test to detect in such defendant the presence of the etiologic agent for acquired immune deficiency syndrome;

(B) to disclose the results of such test to such defendant and to the victim of such sexual act; and

(C) to provide to the victim of such sexual act counseling regarding HIV disease, HIV testing, in accordance with applicable law, and referral for appropriate health care and support services.

(3) For purposes of this subsection--

(A) the term "convicted" includes adjudicated under juvenile proceedings; and

(B) the term "sexual act" has the meaning given such term in subparagraph (A) or (B) of section 2245(1) of title 18, United States Code.

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No. 01-1231

In The

Supreme Court of the United States

CONNECTICUT DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, COMM., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER,

Petitioners,

v.

JOHN DOE, SAMUEL POE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Did the court of appeals correctly apply Supreme Court precedent in holding that Connecticut's version of Megan's Law violates the Fourteenth Amendment by publicly and, Plaintiff-Respondent John Doe (Plaintiff Doe) claims, falsely branding Plaintiff Doe and due process class members as likely dangerous sexual offenders, plus imposing on them extensive, intrusive registration and reporting obligations which alter their legal status, without affording them notice and a hearing on whether they are dangerous?

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STATEMENT OF THE CASE

Plaintiff Doe respectfully submits that Defendants-Petitioners Department of Public Safety et al's [hereinafter Defendants] Petition For Writ Of Certiorari [Petition] should be denied. The Court of Appeals for the Second Circuit's decision below is consistent with this Court's controlling precedents. The decision below does not conflict with other courts of appeals' decisions cited by Defendants because it rests on a legal theory not addressed in those other decisions. And the record does not support Defendants' eleventh hour effort to recharacterize the challenged statute.

A. The Statute.

Plaintiff Doe claims he is not a dangerous sexual offender and does not pose a threat to the safety of the community. (Plaintiffs' Appendix [hereinafter Pl. App.] 2). Pursuant to Connecticut's version of Megan's Law, Connecticut General Statutes Sections 54-250 et seq. (2001) (the Connecticut Sex Offender Registry Act, or CT-SORA),[1] he nonetheless is required, without notice or a hearing, to register and be publicly displayed on the Internet as a sex offender. Conn. Gen. Stat. §§54-250 et seq. He must also keep Defendant-Petitioner Connecticut Department of Public Safety [Defendant Department of

---

[1] Plaintiff Doe's Fourth Amendment Complaint (Pl. App. 1-21), was filed in 2000 when the 1999 revision of the Connecticut Sex Offender Registry Act (CT-SORA) was in place. The 2001 amendment to the law consisted of a single editorial change; the law otherwise is identical to the 1999 revision. Conn. Gen. Stat. Ann. § 54-250, Historical and Statutory Notes.

Public Safety or Defendant Department] up to date about his appearance and whereabouts, providing: his name; "identifying factors," including fingerprints; a current photograph; a list of other identifying characteristics (such as scars or tattoos); a blood sample for DNA analysis; his criminal history record; and his current address, which must be verified at least annually. This information is required for inclusion in what is intended to be a publicly disclosed and widely disseminated sex offender registry (Sex Offender Registry). Conn. Gen. Stat. §§54-250(3), 54-251(a), 54-252(a), 54-254(a), 54-257(c); (Pl. App. 25-29, ¶¶8-15; 38, ¶¶8-15).

If Plaintiff Doe moves to a new residence, he must inform Defendant Department of Public Safety of his new address within five days. Conn. Gen. Stat. §§54-251(a), 54-252(a), 54-254(a). If he regularly travels to or temporarily resides in another state, he must register with the responsible agency there and comply with whatever additional duties that state imposes on sex offenders. *Id.* He must complete and return to Defendant Department within ten days of receipt a nonforwardable verification form; if he fails to return the form, Defendant Department is required to notify law enforcement authorities, who in turn are required to apply for an arrest warrant. Conn. Gen. Stat. §54-257(c). Plaintiff Doe must submit to having his photograph taken where and whenever Defendant Department requests, at least once every five years. Conn. Gen. Stat. §§54-251(a), 54-252(a), 54-254(a), 54-257(d). Some registrants must fulfill these registration and reporting obligations for ten years; others must do so for life. *Id.* Failure to comply with any of these duties constitutes a class D felony, punishable by up to five

years in prison. Conn. Gen. Stat. §§54-251(d), 54-252(d), 54-253(c), 54-254(b).

Plaintiff Doe's updated identifying information appears on a single registry beneath the heading "Connecticut Department of Public Safety Sex Offender Registry," together with photographs and identifying information of offenders ranging from one-time nonviolent offenders to repeat offenders convicted of rape. *See* Conn. Gen. Stat. §§54-251(a) (requiring registration by "[a]ny person who has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor or a nonviolent sexual offense."); 54-250(5) (" 'Nonviolent sexual offense' means" fourth degree sexual assault, which includes conduct involving neither violence nor minors); 54-254(a) (court may require registration for "any felony that the court finds was committed for a sexual purpose"); 54-252(a) (requiring registration by "[a]ny person who has been convicted or found not guilty by reason of mental disease or defect of a sexually violent offense"); 54-257(a) (registry shall be maintained of all persons required to register including nonviolent and violent sex offenders).

Until its public disclosure was enjoined by the United States District Court for the District of Connecticut in this case, *Doe v. Lee*, 132 F. Supp. 2d 57 (D. Conn.), *aff'd*, *Doe v. Dep't of Public Safety ex rel. Lee*, 271 F.3d 38 (2d Cir. 2001), the Sex Offender Registry was widely publicly disseminated, not just at police stations, but via the Internet's "world-wide web" through state and media web sites with direct links to the registry. Conn. Gen. Stat. §§54-257,

54-258(a)(1); (Local Rule 9(c)(1) Plaintiffs' Statement of Undisputed Facts [hereinafter Plaintiffs' Undisputed Facts] Ex. F, G, H, *Doe v. Lee*, 132 F. Supp. 2d 57 (No. 3:99CV314). Defendant Department of Public Safety is directed by statute to promote the Sex Offender Registry's availability through annual reminders to Connecticut's media that the registry exists, with instructions on where and how it can be obtained. Conn. Gen. Stat. §54-258(a)(1).

The "sole avowed and legitimate purpose of the registry," to "disclos[e] the identity of persons who are currently a threat to public safety," sends a clear message that registrants are particularly likely to be dangerous. *Doe v. Dep't of Public Safety*, 271 F.3d at 49; *see* (Brief for Defendants-Appellants [hereinafter Defendants' Brief Below] at 1, *Doe v. Dep't of Public Safety*, 271 F.3d 38 (No. 01-7561) (law's mandate is to "make . . . registry information more readily available to the public[ ] in order to permit the public to protect itself")). The CT-SORA is based on New Jersey's original Megan's Law, which was enacted "to identify potential recidivists and alert the public when necessary for the public safety." *Doe v. Dep't of Public Safety*, 271 F.3d at 42, n. 4 (*quoting Paul v. Farmer*, 227 F.3d 98, 99 (3d Cir. 2000)). As the district court explained and the Court of Appeals for the Second Circuit agreed:

> The stated purposes of the [law] are to protect the public and facilitate law enforcement. Registration and dissemination serve these goals only because *some* registrants are likely to reoffend. Thus, the message that *some* registrants are currently dangerous is, and is intended to be, communicated to viewers of the registry.

Id. at 49 (*quoting Doe v. Lee*, 132 F. Supp. 2d at 64) (emphasis in original).

The message that registrants are dangerous is also a function of the undifferentiated nature of the Sex Offender Registry. People convicted of offenses requiring registration, from one-time nonviolent offenders to repeat rapists, appear together on a single list beneath the Department of Public Safety Sex Offender Registry label.

> The implied allegation [that Plaintiffs are dangerous, and which they claim is false,] arises from the undifferentiated nature of the registry, in which dangerous and nondangerous registrants are grouped in a single classification and no information is provided regarding any registrant's dangerousness. Because there can be no doubt that some registrants are dangerous, Connecticut's single classification falsely suggests that nondangerous registrants are a threat to public safety.

Doe v. Lee, 132 F. Supp. 2d at 62.

The law's administration likewise tells members of the public that registrants pose a threat to them. Pursuant to the CT-SORA, the Sex Offender Registry is maintained by Defendant Department of Public Safety, whose stated mission is to "provide[ ] a coordinated, integrated program for the protection of life and property within this state. The Department of Public Safety is charged to prevent crime, apprehend criminals, enforce motor vehicle laws, investigate crimes and traffic accidents and perform other regulatory and safety functions." (Plaintiffs' Undisputed Facts, Ex. F, G). When Plaintiff Doe filed this

lawsuit, the foregoing mission statement was prominently displayed on Defendant Department's Internet home page, above a link to the then "on-line" Sex Offender Registry. *Id.*

Unlike sex offender registration laws in, among other states, New York, New Jersey and Massachusetts, and despite the CT-SORA's avowed public safety purpose, Connecticut's Megan's Law provides no procedures to determine whether any registrant is dangerous before he or she is included in the Sex Offender Registry. Conn. Gen. Stat. §§54-250 et seq.; (Pl. App. 26, ¶9; 28, ¶13; 29, ¶15; 38, ¶¶9, 13, 15). While the stated purpose of the CT-SORA is to "make . . . registry information more readily available to the public[ ] in order to permit the public to protect itself," (Defendants' Brief Below at 1), that purpose is undermined by the Sex Offender Registry's admitted failure to provide any information to the public about which registrants pose a safety threat. An introductory paragraph to the Sex Offender Registry web site declares that no registrant is assessed for dangerousness, and that registrants are included simply by virtue of their convictions. (Petition 5). This "disclaimer" fails to dispel the clear message, sent by the collection and publication via the Internet in a single registry of all sex offenders and their convictions, together with their current appearances and whereabouts, that registrants pose a likely public safety threat. As the court of appeals observed, "[e]ven the disclaimer itself, by asserting that the [Department of Public Safety] 'has made no determination that any individual included in the Registry is currently dangerous,' clearly implies that some may be." *Doe v. Dep't of Public Safety*, 271 F.3d at 49. The message conveyed to the public

about sex offender registrants could not be more clear: Beware of the lot of them.

Relief from registration and reporting is available only to very limited categories of offenders. *See* Conn. Gen. Stat. §54-251(b), (c) (all fourth degree and certain second degree sexual assault offenders eligible for relief from registration if court finds "registration is not required for public safety"); Conn. Gen. Stat. §§54-255(a), (b), and (c) (offenders in cohabiting relationships with victims whose identities might be revealed, and one-time offenders who did not serve prison sentence must register, but public notification of registration information may be restricted if court finds no public safety threat). With the foregoing very limited exceptions, all past sex offenders are included in the Sex Offender Registry. Plaintiff Doe does not claim to be eligible for relief under the existing provisions. (Pl. App. 1-3).

The fact that sex offenders alone are required to register and report their current appearance and whereabouts underscores the message that registered sex offenders are likely to be dangerous. While the records of all prior convictions are maintained and made available to the public, only sex offenders are listed as a group, and only this group is singled out by the state to provide, for widespread publication, current information about what they look like and where they live. *Compare* Conn. Gen. Stat. §§54-142g et seq. (conviction histories of all offenders publicly available and listed by individual) *with* Conn. Gen. Stat. §§54-250 et seq. (conviction histories plus current identifying information of sex offenders listed together and actively disseminated via the Internet). As the court of appeals wrote:

> [P]ublication of the registry implies that each person listed is more likely than the average person to be currently dangerous. That implication seems to us necessarily to flow from the State's choice of these particular individuals about whom to disseminate information, a record as to their sex offences, and information as to their current whereabouts. This implication stigmatizes every person listed on the registry. And the plaintiff claims that, as to him, it is false.

Doe v. Dep't of Public Safety, 271 F.3d at 49.

B. The Proceedings Below.

In February 1999, Plaintiff Doe sued Defendants under 42 United States Code Section 1983 for declaratory and injunctive relief. (Pl. App. 2-3). Plaintiff Doe claimed, on behalf of himself and a class of similarly situated persons, that the CT-SORA violated his and class members' due process rights by stigmatizing them as presently dangerous sex offenders and imposing intrusive reporting obligations which alter their legal status, without giving them notice and an opportunity to be heard on whether they threaten public safety. (*Id.* at 20). Plaintiff Doe also claimed the law imposes an additional punishment for past offenses in violation of Article I, section 10 of the United States Constitution. (*Id.* at 20-21).

On March 31, 2001, on the parties' cross motions for summary judgment on Plaintiff Doe's Fourth Amended Complaint, the district court held the CT-SORA deprives

Plaintiff Doe of his right to due process under the Fourteenth Amendment, but does not violate the ex post facto clause of Article I. *Doe v. Lee*, 132 F. Supp. 2d 57.

Citing the CT-SORA's indiscriminate public disclosure of the Sex Offender Registry, which includes not just past convictions but current identifying information of dangerous and nondangerous offenders alike, the court rejected Defendants' claim, highlighted in their Petition to this Court, that the registry does no more than disseminate to the public "truthful and accurate information" about convicted sex offenders. (Petition 3); *Doe v. Lee*, 132 F. Supp. 2d at 63-64. The district court held the undifferentiated Sex Offender Registry conveys not just the truthful message that registrants are convicted sex offenders, but the stigmatizing, and with respect to nondangerous registrants, false message that they are presently dangerous people from whom the public needs to protect itself. *Doe v. Lee*, 132 F. Supp. 2d at 63-64. The court explained that the Sex Offender Registry's stated purpose of protecting the public, and its publication of current, identifying information about registrants, intentionally broadcasts that some registrants are dangerous. *Id.* at 62, 64.

The district court went on to hold that the CT-SORA's undisputed failure to give Plaintiff Doe any notice or opportunity to be heard on whether he is dangerous, "plus" the law's intrusive registration and reporting and extensive disclosure provisions, deprive Plaintiff Doe of a liberty interest without due process. *Id.* at 64-66.

On May 18, 2001, following briefs and oral argument, the district court certified a class of persons similarly

situated to Plaintiff Doe whose due process rights are violated by the CT-SORA (Plaintiffs), and entered a narrowly tailored injunction (the Injunction) which redresses the constitutional wrong by ending public disclosure of the Sex Offender Registry, while continuing to require registration and to allow law enforcement to obtain and disclose current registry information in order to investigate, prosecute, and protect the public from specific offenders who threaten public safety. *Doe v. Lee*, No. 3:99CV314 (RNC), 2001 WL 536727 *1 (D. Conn., May 18, 2001); *Doe v. Lee*, No. 3:99CV314 (RNC), 2001 WL 536729 *1 (D. Conn., May 18, 2001).[2] The court denied Defendants' request for an interim stay of the Injunction pending appeal. *Doe v. Lee*, No. 3:99CV314 (RNC), 2001 WL 536730 *1 (D. Conn., May 18, 2001). The court entered judgment in Plaintiffs' favor on their due process claims for declaratory and injunctive relief, and dismissed Plaintiff's related ex post facto claim. *Doe v. Lee*, No. 3:99CV314 (RNC) (D. Conn., May 21, 2001).

In language that underscores the message sent by the Sex Offender Registry that registrants are dangerous, Defendants sought an emergency stay of the district court's Injunction, urging the court of appeals that the Injunction deprived the public of "very critical registry

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[2] Defendants' assertion that Plaintiff Doe "was and remains the sole plaintiff and appellee," (Petition 4, n. 1), is mistaken. Defendants did not challenge the district court's due process class certification ruling on appeal; the court of appeals' decision applies to Plaintiff Doe and the due process class. *See Doe v. Dep't of Public Safety*, 271 F.3d 38 (2d Cir. 2001) (court reviewed injunction and declaratory rulings entered in favor of due process class).

information relating to sex offenders" who, as a group, "pose[ ] an ongoing danger to the state's citizens." *See* (Transcript of Civil Cause for Motion at 2, *Doe v. Dep't of Public Safety*, 271 F.3d 38 (No. 01-7561)). Following oral argument on June 5, 2001, the court of appeals denied emergency relief, but expedited Defendants' appeal. (*Id.* at 25).

On October 19, 2001, the court of appeals unanimously affirmed the district court's decision. In an opinion carefully analyzing the CT-SORA in light of this Court's due process precedent, discussion *infra* at 13-17, the court of appeals agreed with the district court that Connecticut's Megan's Law both sends a false message that Plaintiffs are dangerous, "plus" significantly alters their legal status, thereby satisfying this Court's "stigma plus" test for a protected liberty interest. *Doe v. Dep't of Public Safety*, 271 F.3d at 47-60.

The court concluded by holding the injunction was properly " 'tailor[ed] to fit the nature and extent of the violation,' " writing:

> We conclude that because it is the communication to the public of the fact that the plaintiff (and other members of the due process class) is in the registry, without a hearing as to the current danger that the plaintiff (and other members of the class) poses, that is both central to the constitutional infirmity of the statute and the principal object of the injunction, the injunction is properly tailored to fit the nature and extent of the violation.

Id. at 62 (*quoting United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1235 (2d Cir. 1987)).[3]

Defendants' Petition followed.

REASONS FOR DENYING THE WRIT

Defendants' request for plenary review should be denied because:

1. The Court of Appeals for the Second Circuit's decision below is consistent with this Court's controlling precedents;

2. The decision below does not conflict with other courts of appeals' decisions cited by Defendants because it rests on a legal theory not addressed in those other decisions; and

3. The record does not support Defendants' eleventh hour effort to recharacterize the challenged statute.

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[3] The court of appeals did not reach the district court's ruling on Plaintiff Doe's claim that the CT-SORA is an unconstitutional ex post facto law, writing: while "the punitive-in-fact aspect of the Connecticut sex offender registry statute as written is problematic[,]" "we need not and do not decide whether" the law violates the ex post facto clause because the due process injunction prevents Connecticut "from enforcing the registry law in a manner that might also render it punitive-in-fact" in violation of the ex post facto clause. *Id.* at 61.

The court left Plaintiff Doe free to "challenge any new Connecticut law or procedure to determine whether it is consonant with the Ex Post Facto Clause." *Id.* at 62. As the court of appeals' judgment need not be changed to preserve later ex post facto challenges, Plaintiff Doe does not cross-petition for certiorari on the ex post facto issue.

I. THE COURT OF APPEALS FOR THE SECOND CIRCUIT'S DECISION BELOW IS CONSISTENT WITH THIS COURT'S CONTROLLING PRECEDENTS

A. Stigma.

The court of appeals rejected Defendants' claim that the Sex Offender Registry does nothing more than convey "truthful and accurate information" about registrants, (Petition 3), properly reasoning that this "literal truth" claim ignores the context in which the Sex Offender Registry is published and the false message it conveys. *Doe v. Dept. of Public Safety*, 271 F.3d at 47-50; *see Codd v. Velger*, 429 U.S. 624, 627-28 (1977) (name clearing hearing required where state actor "creates and disseminates a false and defamatory *impression*" about plaintiff in connection with loss of liberty interest) (emphasis added).

The court of appeals carefully detailed the context and import of the Sex Offender Registry. The court recognized that as the "sole avowed and legitimate purpose of the registry" is to "disclose the identity of persons who are currently a threat to public safety," the registry "conveys the message that *some* persons listed on the registry are currently dangerous." *Doe v. Dep't of Public Safety*, 271 F.3d at 49 (emphasis in original). The court observed that the CT-SORA is based on the original Megan's Law, enacted " 'to identify potential recidivists and alert the public when necessary for the public safety,' " and named for a seven year old victim of an offender with a history of sexually assaulting children. *Doe v. Dep't of Public Safety*, 271 F.3d at 42, n. 4 (*quoting Paul v. Farmer*, 227 F.3d at 99). *See also*, discussion *supra* at 5-6 (Sex Offender Registry administered by Defendant Department of

Public Safety, whose mission of protecting public safety is prominently displayed on Department's home page, above a "link" to Internet registry) (Plaintiffs' Undisputed Facts, Ex. F, G).

The message also is sent by the Defendant Department's on-line disclaimer: the statement that the Department " 'has made no determination that any individual included in the [Sex Offender] Registry is currently dangerous,' clearly implies that some may be." *Doe v. Dep't of Public Safety*, 271 F.3d at 49. Because the registry tells the public that some registrants are dangerous, "it follows that the publication of the registry implies that each person listed is more likely than the average person to be currently dangerous." *Id.*

The dangerousness message "necessarily flow[s]" from the State's singling out of sex offenders for registration and reporting. *Id.* Other offenders are not listed as a group and made to tell the State, for dissemination to the public, where they are and what they look like for a publicly disseminated registry.

Accordingly, the court of appeals held:

> [T]he district court's [Injunction] does not target truthful speech. Publication of the registry in its present form implies that persons listed on the registry are particularly likely to be currently dangerous. Unless everyone on the registry *is* particularly likely to be dangerous, a proposition that the State neither asserts nor embraces, that implication is not true.

Id. at 50 (emphasis in original).

B. "Plus."

Recognizing that false stigma alone is insufficient, the court of appeals took great care to examine whether Plaintiff satisfied the "plus" part of this Court's "stigma plus" test for a liberty interest protected by due process. *Id.* at 51-60. The court focussed on *Paul v. Davis*, in which this Court made it clear that an "interest in reputation alone" is insufficient to establish a liberty interest; there also must be "a right or status previously recognized by state law" that is "altered or extinguished." 424 U.S. 693, 711 (1976) (*quoted in Doe v. Dep't of Public Safety*, 271 F.3d at 53).

Carefully analyzing the facts under the *Paul v. Davis* "plus" analysis, the court catalogued the "extensive and onerous" registration duties imposed by the CT-SORA. For a minimum of ten years and maximum of life, every person convicted of a broad list of sex-related offenses must: register and report his current whereabouts, including temporary changes in address; complete non-forwardable verification forms or face arrest for failure to respond; register with appropriate authorities in other states; submit to updated photographs where and when the State requests; provide blood samples for DNA analysis; and do all of the foregoing or face prosecution for a five year felony. *Doe v. Dep't of Public Safety*, 271 F.3d at 57. "These obligations, taken together," the court concluded, "easily qualify as a 'plus' factor under *Paul*. The imposition on a person of a new set of legal duties that, if disregarded, subject him or her to felony prosecution, constitutes a 'change of [that person's] status' under state law." *Id.* (*quoting Paul v. Davis*, 424 U.S. at 712).

The court cited a number of cases agreeing that sex offender registry obligations constitute a "plus." *Id.* at 57-58 (*citing Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999) (new legal duties and restrictions, including having to give notice to government of address change, constitute "plus"); *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998) (sex offender registration requirements and restrictions are "tangible impairment of a right in addition to mere harm to reputation"), *on remand from* 120 F.3d 1263 (2d Cir. 1997); *Doe No. 1 v. Williams*, 167 F. Supp. 2d 45, 53 (D.D.C. 2001) (sex offender registry statute included "extraordinar[ily broad] and exten[sive] burdens" which satisfy "plus" requirement). And the court distinguished cases from the Sixth and Ninth Circuits which rejected "plus" arguments based on privacy claims, not on ongoing registration and reporting obligations, which were not raised as the basis for the "plus" in those cases. *Id.* (*distinguishing Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) and *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied sub nom. Stearns v. Gregoire*, 523 U.S. 1007 (1998)); *see* discussion *infra* at 18-22 (arguing that court of appeals' decision in this case does not conflict with other federal decisions).

The court of appeals rejected Defendants' argument, reiterated in their Petition, that the stigma plus test is not met because the "plus" caused by the registration requirements "does not result from the same behavior as the 'stigma.' " Petition 24-25. Defendants write: "the [Sex Offender] Registry exists whether or not it is published, or the Registry would have been shut down by the lower court's injunction. The Registry still exists, as do the

registration requirements; only the public's access to the Registry has been enjoined." (*Id.* at 25).

As the court of appeals explained, the "plus" *does* result from the same behavior as the stigma. "The information published by the State is obtained by means of the registration requirement, and a person can be stigmatized by publication of the registry only if he or she is first subjected to that requirement. The 'plus' factor is thus a necessary condition for the stigmatization." *Doe v. Dep't of Public Safety*, 271 F.2d at 59. The court also explained that the fact that only publication, and not registration, was enjoined by the lower courts does not mean the stigma and plus are unrelated: "Our cases have not required the plaintiff to seek a remedy for both the stigma and the 'plus' factor." *Id.* (*citing, e.g., Brandt v. Bd. of Co-op Educ. Servs.*, 820 F.2d 41, 43 (2d Cir. 1987) (fired employee sued to dispel stigma through name clearing hearing without seeking to negate "plus" through reinstatement) (other citation omitted).

The stigma plus test having been satisfied, the court of appeals held that Plaintiff and due process class members "are entitled to the opportunity to have a hearing consistent with due process principles to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in the publicly disseminated registry." *Id.* at 62. There being no dispute that the CT-SORA provides no such hearing, the court of appeals correctly affirmed the district court's Injunction, which precludes public disclosure of the Sex Offender Registry while leaving intact the registration provisions of the CT-SORA and the availability of the registry for use by law enforcement. *Id.*

II. THE DECISION BELOW DOES NOT CONFLICT WITH OTHER COURTS OF APPEALS' DECISIONS CITED BY DEFENDANTS BECAUSE IT RESTS ON A LEGAL THEORY NOT ADDRESSED IN THOSE DECISIONS

While the court of appeals observed that a number of district courts and the Courts of Appeals for the Sixth and Ninth Circuits "have not found a liberty interest in analogous circumstances," it also wrote:

> However, these courts have not necessarily disagreed with the contention that the ongoing legal obligations of sex offender registrants constitute a 'plus' factor. Neither the Sixth Circuit in *Cutshall [v. Sundquist*, 193 F.3d 466] nor the Ninth Circuit in *Russell [v. Gregoire*, 124 F.3d 1079] was presented with such an argument. Instead, the plaintiff in each of those cases claimed that the 'plus' factor consisted of the state's intrusion on his or her right to privacy.

Doe v. Dep't of Public Safety, 271 F.3d at 58 (*also citing Corbin v. Chitwood*, 145 F. Supp. 2d 92 (D. Me. 2001); *Akella v. Mich. Dep't of State Police*, 67 F. Supp. 2d 716 (E.D. Mich. 1999); *Femedeer v. Haun*, 35 F. Supp. 2d 852 (D. Utah 1999), *aff'd in part, rev'd in part*, 227 F.3d 1244 (10th Cir. 2000); *Lanni v. Engler*, 994 F. Supp. 849 (E.D. Mich. 1998); and *Doe v. Kelley*, 961 F. Supp. 1105 (W.D. Mich. 1997)). Like the Court of Appeals for the Second Circuit, the District Court for the District of Columbia has observed that while other courts have rejected Megan's Law challenges alleging "pluses" based on privacy and employment, those courts did not address claims that the obligations of registration alter registrants' legal status and constitute a "plus." *Doe No. 1 v. Williams*, 167 F. Supp. 2d at 56-57

(*distinguishing Cutshall v. Sundquist*, 193 F.3d 466 *and Femedeer v. Haun*, 227 F.3d 1244).

None of the cases cited by Defendants in their Petition addresses the claims decided by the Court of Appeals for the Second Circuit in this matter; the court of appeals has *not* "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

In *Cutshall v. Sundquist*, the Court of Appeals for the Sixth Circuit analyzed public notification provisions that bear no resemblance to those of the CT-SORA. 193 F.3d 466; (Petition 9-10). The CT-SORA authorizes widespread, indiscriminate public disclosure of the Registry; the statute in *Cutshall* authorized public disclosure only of "*relevant information deemed necessary to protect the public concerning a specific sexual offender* who is required to register pursuant to this chapter." *Cutshall v. Sundquist*, 193 F.3d at 471 (*citing* Tenn. Code §40-39-106 (1994)) (emphasis in original). In addition, the "pluses" rejected in *Cutshall* were based not on registration obligations, but on allegedly impaired employment opportunities and privacy rights. *Id.* at 479.

In *Russell v. Gregoire*, the Court of Appeals for the Ninth Circuit examined a multi-tiered registry system with differing degrees of public notification based on individual assessments of registrants' dangerousness. 124 F.3d at 1082-83; (Petition 10-11). Connecticut does not have such a system. Moreover, unlike in Connecticut, public notification in *Russell* was limited by Washington Supreme Court case law holding " 'a public agency must

have some evidence of an offender's future dangerousness, likelihood of reoffense, or threat to the community, to justify disclosure to the public in a given case.' " *Id.* at 1082 (*quoting State v. Ward*, 869 P. 2d 1062, 1070 (Wash. 1994)). " 'An agency must disclose only that information relevant to and necessary for counteracting the offender's dangerousness.' " *Id.* (*quoting State v. Ward*, 869 P. 2d at 1070).

In addition to examining a registration and notification system decidedly different from the one in this case, the *Russell* court examined the registration burdens not to determine whether they met the plus factor requirement under a due process analysis, but whether they had a punitive effect under an ex post facto analysis. *Id.* at 1083.

In *Bruggeman v. Taft*, the Court of Appeals for the Sixth Circuit relied on its decision in *Cutshall* to uphold the dismissal of a pro se plaintiff's civil rights complaint which alleged, inter alia, that Ohio's sexual offender registration law violates the Fourteenth Amendment. No. 01-3380, 2001 WL 1450722 *1 (6th Cir., Oct. 31, 2001) (citing *Cutshall v. Sundquist*, 193 F.3d 466); (Petition 9, n. 8). In this unpublished opinion, without detailing the plaintiff's claims and without analyzing the provisions of Ohio's sex offender law, the court simply cited *Cutshall* and stated it had "recently held that there is no liberty interest in being free from having to register as a sex offender or from public disclosure of registry information." 2001 WL 1450722 *1. The "plus" arguments raised in this case were not addressed in *Bruggeman v. Taft*.

The plaintiff in *Corbin v. Chitwood* sued to enjoin police from notifying his community of his address and

sex offender history alleging, inter alia, that he was entitled to notice and a hearing prior to community notification. 145 F. Supp. 2d at 100-101; (Petition 9, n. 9). Unlike Plaintiff Doe, Corbin failed to allege the necessary "plus." "Corbin's complaint lack[ed] the 'something more' that would entitle him to procedural due process," and the court rejected his claim without addressing the stigma plus issue decided by the court of appeals in this case. *Id.* at 101.

In *Akella v. Michigan Dep't. of State Police*, plaintiffs' claimed "plus" factors were infringements on their rights to privacy, personal security, and to pursue employment and housing opportunities. 67 F. Supp. 2d at 728-731; (Petition 9, n. 9). Unlike Plaintiffs in this case, the plaintiffs in *Akella* "acknowledge[d] that the [disseminated] information is already a matter of public record." 67 F. Supp. 2d at 729. Focusing primarily on that admission, the *Akella* court summarily rejected plaintiffs' "plus" claims. The "plus" found by the *Doe v. Dep't of Public Safety* court was based on claims and facts neither raised nor ruled upon in *Akella*.

Unlike the Sex Offender Registry in this case, the Michigan registry reviewed in *Lanni v. Engler* and *Doe v. Kelly*, "is organized by zip code, so that only those registered offenders living within a given zip code will appear on any given registry." *Lanni v. Engler*, 994 F. Supp. at 852 (*citing* Mich. Comp. Laws Ann. §28.728(1) (1997); *see Doe v. Kelly*, 961 F. Supp. at 1109 (same); (Petition 10, n. 9). Unlike Plaintiffs in this case, the plaintiffs in *Lanni v. Engler* and *Doe v. Kelly* did not raise and the courts in those matters did not rule on a "plus" factor based on intrusive, ongoing registration obligations.

As shown above, the court of appeals' decision in this case is consistent with this Court's due process precedent, and is not "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). As shown below, Defendants' Petition is inconsistent with the record and unsupported by the law.

III. THE RECORD DOES NOT SUPPORT DEFENDANTS' ELEVENTH HOUR EFFORT TO RECHARACTERIZE THE CHALLENGED STATUTE

A. Defendants' Petition Is Inconsistent With The Record Below And Connecticut Supreme Court Case Law.

Abandoning the public safety arguments they made so strenuously below, Defendants now argue that the purpose of Connecticut's and other states' Megan's Laws is to gather and provide information that the public simply wants to have, and that Congress encourages states, through certain federal grants, to give. (Petition 3). Defendants ignore the public safety arguments in their effort to avoid the Sex Offender Registry's ineluctable message that registrants are likely to be dangerous; that message is, in significant part, a function of the law's avowed purpose of protecting the public from sex offenders. *See Doe v. Lee*, 132 F. Supp. 2d at 62, 64 (Sex Offender Registry's stated purpose of protecting public and publication of current, identifying information about registrants, intentionally broadcasts that some registrants are dangerous).

Defendants argued below:

- "Connecticut has incrementally taken steps *in the interest of public safety* to expand the registration and notification requirements of the original Act, and to make such registry information more readily available to the public, *in order to permit the public to protect itself.*" (Defendants' Brief Below at 1) (emphasis added); and

- The district court's order enjoining the registry's publication poses "*very dramatic* and *drastic harm*" to the public by depriving it of "very critical registry information. . . . " (Transcript of Civil Cause for Motion at 2, *Doe v. Dep't of Public Safety*, 120 F.3d 1263 (No. 01-7561)) (emphasis added).

In contrast, Defendants' Petition claims the CT-SORA's purpose is solely to promote the free "flow of true and accurate information" to the public. (Petition 20). They tell this Court:

- "In enacting [Megan's Laws,] [s]tates have responded to public demand for information about sex offenders living in or having access to communities, as well as to Congress' conditioning the provision of federal grant money on the enactment of laws to make registration information available to the public." (Petition 3); and

- [T]he court of appeals' decision, "if allowed to stand or if adopted in other circuits, will control and hamper a state's ability to deliver to the public truthful, accurate and important information about sexual offenders, and hamper states' ability to comply with federal mandates." (*Id.*)

Defendants' apparent abandonment of their public safety arguments is inconsistent not just with their arguments below, but also with the Connecticut Supreme Court's assessment that Connecticut's Megan's Law "was enacted to protect the public from sex offenders." *State v. Kelly*, 770 A. 2d 908, 954 (Conn. 2001). In *Kelly*, the supreme court rejected a criminal defendant's claim that a sentencing court violated his rights under the ex post facto clause by imposing a sentence requiring registration as a sex offender. *Id.*[4] The supreme court addressed only the statute's registration requirements, not the public notification provisions. *Id.* at 952-54. Indeed, the court apparently, and erroneously, assumed *there would be no public notice* of the defendant's registration: "the fact that the 'registration itself . . . can usually be accomplished without public notice,' " means that registration " 'does not ordinarily result even in societal opprobrium or harassment.' " *Id.* at 954 (*quoting Doe v. Pataki*, 120 F.3d 1263, 1285) (2d Cir. 1997) (reversing ex post facto ruling and remanding on due process claims), *cert. denied*, 522 U.S. 1122 (1998)).[5]

Defendants' free flow of information argument is inconsistent with the record Defendants made below and with Connecticut Supreme Court case law.

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[4] The supreme court cited Connecticut General Statutes Sections 54-102r (repealed, 1998) and 54-102s (transferred to Conn. Gen. Stat. §54-260, 1998), but its discussion broadly refers to Connecticut's "Megan's Law." *State v. Kelly*, 770 A. 2d 908 (Conn. 2001)

[5] *State v. Kelly* does not dispose of Plaintiff Doe's ex post facto arguments, which are based in significant part on the CT-SORA's indiscriminate public disclosure provisions. *See id.*; discussion *supra* at 10, n. 2.

B. Defendants' Arguments Are Undermined By United States Supreme Court Case Law.

Defendants fail to explain why gathering and publishing the current appearance and whereabouts of past sex offenders is "important," (Petition 3), if the information serves no public safety or other identified purpose. That aside, whatever Defendants' rights to gather and disseminate truthful information to the public may be, those rights are not implicated in this case in which Defendants publish not truthful, but false and defamatory information. *Doe v. Dep't of Public Safety*, 271 F.3d at 50 ("the district court's order does not target truthful speech").

Defendants do not dispute the material facts on which the district court and court of appeals based their carefully drawn legal conclusion that, as to nondangerous registrants, the Sex Offender Registry sends a false message that registrants are likely to be currently dangerous. *See* (Petition 5-7, 18-20) (summarizing district and court of appeals' holdings). Instead, Defendants urge that the Sex Offender Registry cannot be defamatory because it contains only "accurate" information about sex offenders. (Petition 3-5, 18-20).

Defendants' "literal truth" argument has been rejected by this Court. Where the State "creates and disseminates a false and defamatory *impression*" about a plaintiff in a way that implicates a liberty interest, the plaintiff is entitled to a due process hearing to clear his name. *Codd v. Velger*, 429 U.S. at 628 (emphasis added); *cf. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (even statement of opinion is defamatory where it *"impl[ies]* a false assertion of fact") (emphasis added). Defendants' argument that registry information is literally "accurate"

fails to negate the Sex Offender Registry's "impli[cation] that persons listed on the registry are particularly likely to be currently dangerous." *Doe v. Dep't. of Public Safety*, 271 F.3d at 50.

In another argument that has been rejected by this Court, Defendants urge that they provide no information about dangerousness because it is too "costly, cumbersome and inaccurate" to "rank[ ] sexual offenders by their likelihood to reoffend." (Petition 4). This Court has written:

> Our cases indicate . . . that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention . . . 'that it is impossible to predict future behavior and that the question is so vague as to be meaningless.'

Schall v. Martin, 467 U.S. 253, 278-79 (1984) (*quoting Jurek v. Texas*, 428 U.S. 262, 274 (1976)) (plurality opinion) (footnote omitted); *accord Kansas v. Hendricks*, 521 U.S. 346, 358 (1997); *cf. Kansas v. Crane*, 122 S. Ct. 867, 875 (2002) (a finding that mental abnormality or disorder renders previous offender likely to commit future acts of sexual violence is "coherent, and (with the assistance of expert testimony) well within the capacity of a normal jury") (Scalia, J., dissenting).

Defendants' failure to provide any information about whether and which registrants are dangerous undermines the stated public safety purpose of the CT-SORA, and misleads the public by implying that all registrants are likely to pose a threat to the safety of women and children.

C. Defendants' Petition Is Unsupported By The Statutes They Cite.

Defendants argue that any message of dangerousness comes "not from the [Sex Offender] Registry's availability, structure or insufficient disclaimer, but, as the Court of Appeals itself has noted on a previous occasion, from the crimes the plaintiff has committed." (Petition 19).[6] This argument obfuscates a critical distinction carefully drawn by the lower courts, a distinction Defendants would have this Court ignore: Connecticut criminal conviction records, which include a person's name, date of birth and criminal convictions and sentences, tell the public that a particular person committed a particular crime or crimes *in the past*; but the Sex Offender Registry which, in response to a click of a computer mouse, lists all registrants' current appearances and locations, and broadcasts them to protect public safety, tells the public that those registrants are likely to be *presently* dangerous and at risk of reoffending *now and in future*. *See Doe v. Dep't of Public Safety*, 271 F.3d at 48-50; *Doe v. Lee*, 132 F. Supp. 2d at 62-64. *Compare* Conn. Gen. Stat. §§54-142g et seq. (criminal conviction records are limited to past conviction information maintained as to individual

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[6] Defendants' reference here to *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998) is inapposite. In that case, the court of appeals rejected an ex post facto challenge to New York's sex offender registry law which, unlike the CT-SORA, provides for dangerousness assessments, gives all registrants an opportunity to be relieved from registration by showing they are not dangerous, distinguishes between offenders' levels of dangerousness, and limits publication of registrants' information depending on their assessed dangerousness level.

offenders, not categories of offenders) *with* Conn. Gen. Stat. §§54-250 et seq. (registry groups sex offenders together and includes their conviction records together with current appearances and whereabouts).[7]

Defendants' argument that the court of appeals' ruling "hamper[s] the states' ability to comply with federal mandates," (Petition 3), is undermined by the statute on which Defendants purport to rely. The federal version of Megan's Law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 United States Code Section 14071, was enacted for the "general purpose of protecting the public from persons who molest or sexually exploit children and from other sexually violent offenders." Megan's Law, Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Act, as amended [hereinafter DOJ Guidelines], 64 Fed. Reg. 2,571, 2,575 (Jan. 5, 1999). The Wetterling Act provides: "The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the

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[7] Defendants also urge that registry information "is, in fact, publicly available pursuant to Connecticut's state freedom of information laws." (Petition 18, n. 18) (*citing*, Conn. Gen. Stat. §1-210(a)). As Defendants conceded below, registrants' current photographs and addresses are not *already* available under the Connecticut Freedom of Information Act and Connecticut's criminal history laws. (Transcript of oral argument at 2-3, *Doe v. Dep't of Public Safety*, 271 F.3d 38 (No. 01-7561)) ("Some of this information would not be obtainable but for the [CT-SORA].") *Compare* Conn. Gen. Stat. §§54-142g et seq. (offenders' convictions and sentences publicly available) *with* Conn. Gen. Stat. §§54-250 et seq. (convictions and sentences plus current identifying information of sex offenders actively disseminated including via Internet).

State. . . . The State or any agency authorized by the State shall release relevant information that is *necessary to protect the public concerning a specific person* required to register under this section." 42 U.S.C. §14071(e)(1), (2) (as amended, 1998) (emphasis added).

The Wetterling "Act's definitions of covered offense categories are tailored to its general purpose of protecting the public from persons who molest or sexually exploit children and from other sexually violent offenders. Hence, these definitions *do not include all offenses that involve a sexual element*." DOJ Guidelines, 64 Fed. Reg. 2,575 (emphasis added). The CT-SORA, which covers most if not all offenses involving a sexual element, goes well beyond the mandate of the Wetterling Act. *See* Conn. Gen. Stat. §§54-251(a) (requiring registration by "[a]ny person who has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor *or a nonviolent sexual offense*.") (emphasis added); 54-250(5) (" 'Nonviolent sexual offense' means fourth degree sexual assault, which includes conduct involving neither violence nor minors); 54-254(a) (court may require registration for "any felony that the court finds was committed for a sexual purpose"). Indeed, since Defendant Department of Public Safety makes "no determination that any individual in the Registry is currently dangerous," the CT-SORA does not even achieve the Wetterling Act's stated purpose of releasing "relevant information that is necessary to protect the public *concerning a specific person* required to register." *See* (Petition 5); 42 U.S.C. §14071(e)(2) (emphasis added).

The Wetterling Act's disclosure requirement is entirely consistent with the district court's Injunction. The Injunction explicitly states: "nothing in this order shall . . . preclude law enforcement agencies and officers carrying out official duties from disclosing or disseminating to the public information necessary to protect the public concerning a specific person, so long as members of the [certified class, i.e., Plaintiffs] are not described to the public as being included in the registry." *Doe v. Lee*, 2001 WL 536729, at *1.

The Connecticut and federal statutes cited by Defendants do not support their Petition.

CONCLUSION

The Court of Appeals for the Second Circuit's decision correctly applies this Court's precedent, is consistent with the decisions of other courts of appeals, and does not warrant plenary review. Defendants' Petition should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, on behalf of himself and all others similarly situated, Plaintiffs, v. DR. HENRY C. LEE, in his official capacity as Commissioner of Public Safety; WILLIAM CARBONE, in his official capacity as Director of the Office of Adult Probation and Director of the Court Support Services Division of the Judicial Department; and JOHN ARMSTRONG, in his official capacity as Commissioner of Correction, Defendants.	CIVIL NO. 3:99CV00314(RNC) November 14, 2000

PROPOSED FOURTH AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This action is brought by plaintiff John Doe, on behalf of himself and all others similarly situated, to challenge the constitutionality of the Connecticut law requiring the registration and public disclosure of information concerning persons designated as "sex offenders."

2. The statutory registration and disclosure law, codified at Conn. Gen. Stat. §§ 54-250 *et seq.*, designates

persons convicted of certain specified offenses as "sexual offenders" who must register with the Department of Public Safety and provide certain identifying information.

3. In the name of public safety, the law provides for widespread public dissemination of information regarding persons designated as "sex offenders," including the publication of a physical description, photograph and current residence address on the internet. This system suggests to the public that Connecticut law enforcement officials have made a determination that persons designated as "sex offenders" pose a threat to the safety of the community. However, registration is required solely on the basis of a conviction for one of the offenses listed in the statute. Widespread dissemination of a person's designation as a "sex offender" and his identifying information occur without any assessment of whether the person in fact poses any danger to the community. As a result, persons designated as "sex offenders" are unfairly stigmatized and threatened with the ostracism, threats to personal safety, loss of employment and housing opportunities, and other adverse consequences resulting from the public perception that they are currently dangerous sex offenders who pose a threat to the safety of the community.

4. John Doe is not a dangerous sexual offender and does not pose a threat of safety to the community.

5. This action seeks a declaratory judgment holding that the statutory registration and public disclosure scheme is unconstitutional and an injunction prohibiting its further enforcement on the ground that it deprives the

plaintiff and the class members he seeks to represent of their rights as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Ex Post Facto Clause of the United States Constitution.

JURISDICTION AND VENUE

6. This action arises under 42 U.S.C. § 1983 and the Ex Post Facto Clause, Article I, Section 10, of the United States Constitution and the Fourteenth Amendment to the United States Constitution. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(4). Jurisdiction to grant a declaratory judgment is conferred by 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper in this district under 28 U.S.C. § 1391.

PARTIES

Plaintiff

8. Plaintiff John Doe is a resident of the State of Connecticut who has been convicted of an offense that requires registration as a sexual offender pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* John Doe is a pseudonym that is being used in this case to protect the true identity of the plaintiff from public disclosure.

Defendants

9. Defendant Dr. Henry C. Lee is and has been the Commissioner of Public Safety since approximately June 1998. Defendant Lee is sued in his official capacity.

10. Pursuant to Conn. Gen. Stat. §§ 54-257(a) and 54-258(a)(1), the Department of Public Safety is responsible for establishing, maintaining and making publicly available a registry of all persons required to register as "sexual offenders."

11. Defendant William Carbone is and has been the Executive Director of the Court Support Services Division of the Judicial Department since September 25, 1998. Since April 2, 1999, defendant Carbone has held the position of Director of the Office of Adult Probation. As Director of the Office of Adult Probation, defendant Carbone's responsibilities are set forth in Conn. Gen. Stat. § 54-105. Defendant Carbone is sued in his official capacity.

12. Defendant John Armstrong is and has been the Commissioner of Correction since approximately January 1995. Defendant Armstrong is sued in his official capacity.

13. Pursuant to Conn. Gen. Stat. § 18-81, defendant Armstrong is responsible for the overall supervision and direction of all institutions, facilities and activities of the Department of Correction.

14. Pursuant to Conn. Gen. Stat. § 54-256, defendant Armstrong is responsible for requiring persons to register as required under Conn. Gen. Stat. §§ 54-250 *et seq.* prior to their release into the community.

15. At all times relevant hereto, the defendants acted under color of state law in connection with their enforcement of Conn. Gen. Stat. §§ 54-250 *et seq.*

CLASS ACTION ALLEGATIONS

16. The named plaintiff brings this action pursuant to Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of himself and all other persons similarly situated.

17. Plaintiff is a member of and seeks to represent two classes consisting of (1) all persons who are subject to the registration requirements of Conn. Gen. Stat. §§ 54-250 *et seq.* (the "due process class") and (2) all persons who are subject to the registration requirement of Conn. Gen. Stat. §§ 54-250 *et seq.* and whose convictions arise out of conduct that occurred prior to the effective date of the provisions requiring their registration and/or public dissemination of identifying information concerning them (the "ex post facto class").

18. The due process class is so numerous that joinder of all members is impracticable.

19. Upon information and belief, over 1,900 persons are currently subject to the registration requirements of Conn. Gen. Stat. §§ 54-250 *et seq.*

20. There are questions of law and fact common to the due process class, including the following:

a. Whether the members of the class have constitutionally protected liberty interests in not being designated as currently dangerous sexual offenders who pose a threat to public safety; and

b. Whether the conduct of the defendants has deprived members of the class of their liberty interests without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

21. The claims of the named plaintiff are typical of the claims of the members of the due process class in that the constitutional deprivation caused by the conduct of the defendants is the same for the named plaintiff and all other members of the class.

22. The named plaintiff will fairly and adequately represent the interests of the members of the due process class.

23. The ex post facto class is so numerous that joinder of all members is impracticable.

24. Upon information and belief, most of the persons required to register under Conn. Gen. Stat. §§ 54-250 *et seq.* must register based on convictions arising out of conduct that occurred prior to the effective date of the applicable registration and/or public disclosure provisions.

25. There are questions of law and fact common to the ex post facto class, including the following:

a. Whether the registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* retroactively impose punishment within the meaning of the Ex Post Facto Clause;

b. Whether the burdens associated with the registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* are imposed for the purposes of punishment; and

c. Whether the registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* are punitive in fact.

26. The claims of the named plaintiff are typical of the claims of the members of the ex post facto class in

that the constitutional deprivation caused by the conduct of the defendants is the same for the named plaintiff and all other members of the class.

27. The defendants have acted on grounds generally applicable to all members of both classes, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

STATEMENT OF FACTS

A. Designation of Persons As Sex Offenders.

28. Persons convicted of certain specified offenses are designated as "sexual offenders" who must register with the Department of Public Safety. Conn. Gen. Stat. §§ 54-250 *et seq.*

29. Registration as a "sexual offender" is required solely on the basis of a conviction for one of the offenses enumerated in the statute. Conn. Gen. Stat. §§ 54-251(a), 54-252(a), 54-252(b), 54-253(a).

30. Persons required to register as sexual offenders are obligated to provide their name, residence address, criminal history record, fingerprints, a photographic image, and a description of such other identifying characteristics as may be required by the Commissioner of Public Safety. Conn. Gen. Stat. §§ 54-250(3), 54-251(a), 54-252(a), 54-252(b), 54-253(a).

31. The Department of Public Safety does not conduct any assessment as to whether or not an individual poses any threat to the safety of the community in order to determine whether or not that person is required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*

32. Upon information and belief, consistent with Conn. Gen. Stat. § 54-1421, the Department of Public Safety has a procedure in place to respond to challenges to the accuracy or completeness of conviction records of persons believed to be subject to the registration requirements pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*. Other than that, the Department of Public Safety does not have statutory authority to exercise any discretion in determining whether individuals must register or whether they may be excused from registering pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*.

33. The Office of Adult Probation has and continues to require persons subject to its supervision to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*.

34. The Office of Adult Probation does not conduct any assessment of persons subject to its supervision regarding any threat an individual poses to the safety of the community in order to determine whether or not a person is subject to the registration requirements of Conn. Gen. Stat. §§ 54-250 *et seq*.

35. The Department of Correction has required and continues to require some of the persons subject to its supervision to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*. and 54-102g.

36. The Department of Correction does not conduct any assessment as to whether or not an individual poses any threat to the safety of the community in order to determine whether or not that person is required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*.

B. Duration of Sex Offender Registration Requirements.

37. Persons convicted of a single offense defined as a "criminal offense against a victim who is a minor" or a "nonviolent sexual offense" must register for at least ten years. Conn. Gen. Stat. § 54-251(a).

38. Lifetime registration is required for persons convicted of a "criminal offense against a victim who is a minor" or a "nonviolent sexual offense" who have one or more prior convictions for any such offense and for persons convicted of first-degree sexual assault for engaging in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person. Conn. Gen. Stat. § 54-251(a).

39. Lifetime registration is required for persons convicted of any offense defined as a "sexually violent offense." Conn. Gen. Stat. §§ 54-252(a).

40. Lifetime registration is required for persons subject to the registration requirements under earlier versions of the sex offender registration law, except for those who qualify for court-ordered exemption from registration. Conn. Gen. Stat. §§ 54-251(b)-(c), 54-252(a).

41. The only persons who qualify for court-ordered exemption from registration are (1) persons under nineteen years of age at the time of the offense convicted of sexual assault in the second degree for engaging in sexual intercourse with another person and such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such

person and (2) persons convicted of sexual assault in the fourth degree for subjecting another person to sexual contact without such other persons' consent. Conn. Gen. Stat. § 54-251(b)-(c).

C. Requirement of Blood Sample for DNA Analysis from Persona Designated as Sex Offenders.

42. Persons required to register as "sexual offenders" are required to submit a blood sample for DNA (deoxyribonucleic acid) analysis, unless such a sample has been previously obtained in accordance with Conn. Gen. Stat. § 54-102g. Conn. Gen. Stat. § 54-250(3).

43. Persons required to register as "sexual offenders" are subject to prosecution for a class D felony if they do not submit to having a blood sample taken for DNA analysis. Conn. Gen. Stat. §§ 54-251(d), 54-252(d), 54-253(c).

44. The Department of Public Safety maintains a databank of DNA characteristics of persons designated as "sexual offenders." Conn. Gen. Stat. § 54-102g(d).

45. Upon information and belief, the Department of Public Safety does not require persons other than those designated as "sexual offenders" to submit to having blood samples taken for inclusion in a databank of identification characteristics of profiles resulting from DNA analysis.

46. Upon information and belief, persons other than those required to register as "sexual offenders" are not subject to felony prosecution for refusing to provide a blood sample to the State of Connecticut for inclusion in a

databank of identification characteristics of profiles resulting from DNA analysis.

D. Continuing Legal Obligations of Persons Designated as Sex Offenders.

47. Persons required to register as "sexual offenders" are subject to possible felony prosecution for failure to comply with the legal obligations imposed by Conn. Gen. Stat. §§ 54-250 *et seq.*

48. Failure to comply with the registration provisions subjects persons required to register as "sexual offenders" to possible prosecution for a class D felony. Conn. Gen. Stat. §§ 54-251(d), 54-252(d), 54-253(c).

49. Persons required to register as "sexual offenders" must comply with address verification procedures for their entire registration period, unless registration is suspended by the Department of Public Safety while the person is incarcerated, under civil commitment, or residing outside Connecticut. Conn. Gen. Stat. § 54-257(b)-(c).

50. Persons required to register under Conn. Gen. Stat. §§ 54-251 or 54-254 must submit an address verification form annually after their initial registration dates. Conn. Gen. Stat. § 54-257(c).

51. Persons required to register under Conn. Gen. Stat. § 54-252 must submit an address verification form every ninety days after their initial registration dates. Conn. Gen. Stat. § 54-257(c).

52. Failure to return address verification forms or providing false registration information subjects registrants to possible arrest and prosecution for a class D felony. Conn. Gen. Stat. § 54-257(c).

53. All persons required to register who change their address are required to register the new address in writing with the Commissioner of Public Safety within five days of the change. Conn. Gen. Stat. §§ 54-251(a), 54-252(a).

54. Failure to register a new address with the Commissioner of Public Safety within five days subjects registrants to possible arrest and prosecution for a class D felony. Conn. Gen. Stat. §§ 54.251(d), 54-252(d), 54-253(c).

55. Upon information and belief, the State of Connecticut does not impose registration requirements with criminal penalties on persons with criminal convictions who have completed their sentences other than persons required to register pursuant to Conn. Gen. Stat. §§ 54-250 of *et seq.*

56. Upon information and belief, persons other than those required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* are not subject to possible arrest and felony proseuction for failure to provide current residence information on an ongoing basis to the State of Connecticut.

57. Upon information and belief, persons other than those required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* are not subject to possible arrest and felony proseuction for failure to have a photograph taken by the Department of Public Safety.

E. Public Dissemination of Information Regarding Persons Designated as Sex Offenders.

58. Upon receipt of registration information, the Department of Public Safety is responsible for entering this information into a registry of persons required to register as "sexual offenders." Conn. Gen. Stat. § 54-257(a).

59. The sex offender registry must be made accessible to the public at the Department of Public Safety, each local police department, and each state police troop in Connecticut. Conn. Gen. Stat. § 54-258(a)(1).

60. The Department of Public Safety is also required to make registry information available to the public through the internet. Conn. Gen. Stat. § 54-258(a)(1).

61. The Department of Public Safety is required to issue notices, not less than once per calendar quarter, to all print and electronic media in Connecticut regarding the availability and means of accessing the sex offender registry. Conn. Gen. Stat. § 54-258(a)(1).

62. The Department of Public Safety sex offender registry website includes registration information regarding all persons who register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*, except for those who qualify for court-ordered restriction on dissemination of registration information.

63. Upon a conviction or finding of not guilty by reason of mental disease or defect, the Court may order the Department of Public Safety to restrict the dissemination of registration information for law enforcement purposes and not make it available to the public for certain

registrants if the court finds that dissemination of the information would be likely to reveal the identity of the victim within the community where the victim resides and dissemination is not required for public safety. Conn. Gen. Stat. § 54-255(a)-(b).

64. The court authority to order restricted dissemination of registration information upon a conviction or finding of not guilty by reason of mental disease or defect applies to persons who meet one of the following descriptions:

a. persons convicted or found not guilty by reason of mental disease or defect of the class B felony of sexual assault in a spousal or cohabiting relationship, Conn. Gen. Stat. § 54-255(a); or

b. Persons convicted or found not guilty of any offense requiring registration where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in Conn. Gen. Stat. § 46b-21, Conn. Gen. Stat. § 54-255(b).

65. Certain persons convicted or found not guilty by reason of mental disease or defect of offenses between October 1, 1988 and June 30, 1999 may petition the court to order the Department of Public Safety to restrict the dissemination of registration information for law enforcement purposes and not make it available to the public for certain registrants. Conn. Gen. Stat. § 54-255(c).

66. The court authority to order restricted dissemination of information for persons convicted or found not guilty of an offense between October 1, 1988 and June 30,

1999 applies to persons who meet one of the following descriptions:

a. Persons convicted or found not guilty by reason of a mental disease or defect of engaging in sexual intercourse with another person and such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person and under nineteen years of age at the time of offense, Conn. Gen. Stat. § 54-255(c)(1);

b. Persons convicted or found not guilty by reason of a mental disease or defect of subjecting another person to sexual contact without such other person's consent, Conn. Gen. Stat. § 54-255(c)(2);

c. Persons convicted or found not guilty by reason of a mental disease or defect of any offense requiring registration where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in Conn. Gen. Stat. § 46b-21, Conn. Gen. Stat. § 54-255(c)(3);

d. Persons convicted or found not guilty by reason of a mental disease or defect of sexual assault in a spousal or cohabiting relationship, Conn. Gen. Stat. § 54-255(c)(4); or

e. Persons convicted or found not guilty by reason of a mental disease or defect of any crime which requires registration when the offender (i) served no jail or prison time as a result of such conviction or finding of not guilty by reason of mental disease or defect, (ii) has not been subsequently conviced or found not guilty by reason of mental disease or defect of any crime which would

require registration, and (iii) has registered with the Department of Public Safety, Conn. Gen. Stat. § 54-255(c)(5).

67. As a condition of ordering that a person's registration information not be made available for public access pursuant to Conn. Gen. Stat. § 54-255(c), the court must find that the dissemination of the information is not required for public safety. Conn. Gen. Stat. § 54-255(c).

68. The statute does not provide any standards for a court to determine when dissemination of registration information is or is not required for public safety.

69. The Department of Public Safety sex offender registry does not provide sufficient information for members of the public to determine whether any particular person who appears on the registry poses a threat to public safety.

F. Community Notification Regarding Sex Offenders.

70. Upon receipt of registration information, the Department of Public Safety is responsible for notifying the local police department or state police troop having jurisdiction where the registrant resides or plans to reside. Conn. Gen. Stat. § 54-257(a).

71. Any state agency, the Judicial Department, any state police troop or any local police department are authoritzed to notify any government agency, private organization or individual of any registration information when such agency, said Department, such troop or local police department believes such notification is necessary

to protect the public or any individual in any jurisdiction from any person who is subject to registration. Conn. Gen. Stat. § 54-258(a)(2).

72. Conn. Gen. Stat. §§ 54-250 *et seq.* does not provide any standards to determine the circumstances when notification is necessary to protect the public or any individual in any jurisdiction pursuant to Conn. Gen. Stat. § 54-258(a)(2).

73. Upon information and belief, the Department of Public Safety does not have a procedure to permit registrants to contest the necessity of notification to protect the public or any individual in any jurisdiction from the registrant.

74. Upon information and belief, the Office of Adult Probation has a practice of notifying members of the public regarding certain persons subject to the supervision of the Office of Adult Probation for purposes of public safety.

75. Upon information and belief, other than a court hearing dealing with the issue of notification by the office of Adult Probation of members of the community with regard to an individual under the supervision of the Office of Adult Probation, there is no formal procedure afforded by the Office of Adult Probation for contesting the necessity of notification to members of the community regarding a person convicted of a sexual offense with whom they may have contact.

G. Public Perception of Sex Offender Designation.

76. The system of designating persons as "sex offenders" as described above suggests to the public that Connecticut law enforcement officials have determined that persons so designated pose a threat to public safety.

77. However, registration is required solely on the basis of a conviction for one of the offenses listed in the statute. Widespread dissemination of a person's designation as a "sex offender" and his identifying information occur without any assessment of whether the person in fact poses any danger to the community.

78. Persons designated as "sex offenders" are unfairly stigmatized and threatened with the adverse consequences resulting from the public perception that they are curently dangerous sex offenders who pose a threat to the safety of the community.

Irreparable Harm to Plaintiff and Class Members

79. The defendants' enforcement of Conn. Gen. Stat. §§ 54-250 *et seq.* threatens the plaintiff and the members of the classes he seeks to represent with continuing irreparable injury for which there is no adquate remedy at law, including the following:

a. Plaintiff and the members of the due process class are being publicly branded as currently dangerous sex offenders who pose a threat to public safety regardless of whether there is any basis for such an assessment;

b. Plaintiff and the members of the due process class do not have a constitutionally sufficient

means of contesting their designation in the eyes of the public as currently dangerous sex offenders who pose a threat to public safety;

c. Plaintiff and the members of the ex post facto class are suffering punishment that was not authorized by the law as it existed at the time of the conduct resulting in their convictions;

d. Plaintiff and the members of both classes face possible felony prosecution if they fail to comply with the registration or address verification requirements of Conn. Gen. Stat. §§ 54-250 *et seq.*;

e. Plaintiff and the members of both classes face possible felony prosecution if they fail to comply with the requirement that they submit to having a blood sample taken for DNA analysis; and

f. Plaintiff and the members of both classes are threatened with a multitude of possible adverse consequences resulting from being branded as currently dangerous sex offenders, including shame, humilitation, ostracism, loss of employment, decreased employment opportunities, interference with business opportunities, loss of housing, interference with family and social relationships, and possible physical harm inflicted by members of the public who belive that plaintiff and the class members pose a threat to public safety.

80. Unless the defendants are enjoined from further enforcement of Conn. Gen. Stat. §§ 54-250 *et seq.*, plaintiff and the class members will continue to suffer irreparable injury for which there is no adequate remedy at law.

First Cause of Action

81. Paragraphs 1 through 80 are realleged as if fully set forth herein.

82. Plaintiff and the members of the due process class have constitutionally protected liberty and property interests in not being falsely designated as currently dangerous sex offenders who pose a threat to public safety.

83. The liberty and property interests of the plaintiff and the members of the due process class arise under the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and Article First, sections 7, 8, 9, and 10, of the Connecticut Constitution.

84. The conduct of the defendants has stigmatized the plaintiff and the members of the due process class as currently dangerous sex offenders without any procedure to determine whether there is any factual basis for labeling plaintiff and the class members as a threat to public safety.

85. The conduct of the defendants has deprived and threatens to deprive the plaintiff and the members of the due process class of their constitutionally protected liberty and property interests without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Second Cause of Action

86. Paragraphs 1 through 85 are realleged as if fully set forth herein.

87. Plaintiff and the members of the ex post facto class have convictions arising out of conduct that occurred prior to the enactment of the registration and public disclosure provisions that apply to them.

88. The registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* impose punishment in violation of the Ex Post Facto Clause, Article I, Section 10, of the United States Constitution.

89. The registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* are punitive in that they provide for widespread public dissemination of the designation of persons as "sex offenders" based solely on the existence of a conviction for an offense enumerated in the statute without any assessment of whether the person poses a threat to public safety.

90. The conduct of the defendants has deprived the plaintiff and members of the ex post facto class of their rights protected by the Ex Post Facto Clause.

WHEREFORE, plaintiff requests the following relief:

1. A declaratory judgment holding that Conn. Gen. Stat. §§ 54-250 *et seq.* violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

2. a declaratory judgment holding that Conn. Gen. Stat. §§ 54-250 *et seq.* violates the Ex Post Facto Clause of the United States Constitution;

3. A preliminary and permanent injunction prohibiting defendants, their employees, agents and successors in office from further enforcement of the registration and

public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.*;

4. A preliminary and permanent injunction prohibiting defendants, their employees, agents and successors in office from further public disclosure of the information compiled in the Department of Public Safety sex offender registry;

5. A preliminary and permanent injunction requiring defendants, their employes, agents and successors in office to notify all other governmental entities to which information compiled in the Department of Public Safety sex offender registry has previously been transmitted that they must refrain from further public disclosure of such information;

6. An award of plaintiff's costs and attorneys' fees pursuant to 42 U.S.C. § 1988, and

7. Such other and further relief as this Court deems necessary and proper.

/s/ Shelley R. Sadin
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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, on behalf of himself and all others similarly situated, et al., Plaintiffs,	CIVIL NO. 3:99CV00314 (RNC)
v.	JULY 9, 1999
DR. HENRY C. LEE, in his official capacity as Commissioner of Public Safety, et al., Defendants.	

LOCAL RULE 9(C)1 STATEMENT

This statement sets forth the undisputed facts that may be relevant to the issues to be decided in the parties' motions for summary judgment. The exhibits referred to herein are filed as a separate appendix. Pursuant to the Scheduling Order entered in this case, it is expected that the parties will also file a Joint Stipulation of Undisputed Facts that will include most of the undisputed facts set forth herein as well as some supplemental information.

I. PARTIES.

A. Plaintiff.

1. Plaintiff John Doe is a resident of the State of Connecticut who has been convicted of an offense that

requires registration pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* John Doe is a pseudonym that is being used in this case to protect the true identity of the plaintiff from public disclosure.

B. Defendants.

2. Defendant Dr. Henry C. Lee is and has been the Commissioner of Public Safety since approximately June 1998. Defendant Lee is sued in his official capacity.

3. As Commissioner of Public Safety, defendant Lee has certain responsibilities in connection with Public Act 98-111, as amended by Public Act 99-183. Those responsibilities are set forth in Conn. Gen. Stat. §§ 54-250 *et seq.*

4. Defendant William Carbone is and has been the Executive Director of the Court Support Services Division of the Judicial Department since September 25, 1998. Since April 2, 1999, defendant Carbone has held the position of Director of the Office of Adult Probation. As Director of the Office of Adult Probation, defendant Carbone's responsibilities are set forth in Conn. Gen. Stat. § 54-105. Defendant Carbone is sued in his official capacity.

5. Defendant John Armstrong is and has been the Commissioner of Correction since approximately January 1995. Defendant Armstrong is sued in his official capacity.

6. As Commissioner of Correction, defendant Armstrong's responsibilities are set forth in Conn. Gen. Stat. § 18-81.

7. As Commissioner of Correction, defendant Armstrong also has certain responsibilities in connection with registration of persons pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* and 54-102g.

II. REGISTRATION REQUIREMENTS.

A. Registration of Sex Offenders.

8. The Department of Public Safety has in place the following policies and/or procedures pertaining to the registration of individuals pursuant to Public Act 98-111:

a. Registration Requirement Letter;

b. Change of Address Procedures;

c. Connecticut Convictions Residing Out of State;

d. Death Notification Procedures;

e. DNA Databank Evidence Collection Protocol;

f. Fingerprints;

g. Image Process;

h. Office of Field Operations Orders/Memos;

i. Out of State Convictions, Residing in Connecticut;

j. Registration Instructions;

k. Registration Requirements; and

l. Process for Return of Registration Information.

Copies of the Department of Public Safety policies are provided as Ex. A. In the event that the Department of

Public Safety replaces or modifies any of these policies and/or procedures to comply with Public Act 99-183, copies will be provided to the Court in a supplemental filing.

9. The Department of Public Safety does not conduct any assessment as to whether or not an individual poses any threat to the safety of the community in order to determine whether or not that person is required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*

10. Consistent with Conn. Gen. Stat. § 54-1421, the Department of Public Safety has a procedure in place to respond to challenges to the accuracy or completeness of conviction records of persons believed to be subject to the registration requirements pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* Other than that, the Department of Public Safety does not have statutory authority to exercise any discretion in determining whether individuals must register or whether they may be excused from registering pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*

11. The Department of Correction has required and continues to require some of the persons subject to its supervision to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* and 54-102g.

12. The Department of Correction has in place the following policies and/or procedures pertaining to the identification and/or registration of individuals pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* and 54-102g:

a. Department of Correction Administrative Directive 9.3 (effective date June 1, 1998);

b. Memorandum to All Agency Employees from John J. Armstrong, Commissioner regarding Exception to Administrative Directive 9.3, Admissions, Transfers and Discharge, dated September 21, 1998;

c. Sex Offender Registration (revised September 30, 1998);

d. Memorandum to Facility Contact Persons, Sex Offender Registration Procedures from Fred Levesque, Director, Offender Classification & Population Management regarding Sex Offender Registration Forms, dated September 24, 1998;

e. Memorandum to All Wardens from Fred Levesque, Director, Offender Classification & Population Management regarding Notification to Probation, dated September 28, 1998;

f. Memorandum to Facility Contact Persons, Sex Offender Registration Procedures from Fred Levesque, Director, Offender Classification & Population Management regarding Revised Sex Offender Registration Procedures, dated October 7, 1998;

g. Memorandum to Records Specialists from Fred Levesque, Director, Offender Classification & Population Management regarding Public Act 98-111. An Act Concerning the Registration of Sex Offenders, dated October 1, 1998;

h. Memorandum to All Wardens from Fred Levesque, Director, Offender Classification & Population Management regarding Sex Offender Registration Procedures, dated November 4, 1998;

i. Memorandum to All Wardens from Fred Levesque, Director, Offender Classification & Population Management regarding Sex Offender Registration Audits/Procedures, dated November 24, 1999;

j. Memorandum to Wardens from Fred Levesque, Director, Offender Classification & Population Management regarding Repealed Statutes – Sexual Offenses, dated February 23, 1999; and

k. Sex Offender Registration Procedures for Current Inmates Convicted Prior to 10/1/1998, undated.

Copies of the Department of Correction policies and/or procedures are provided as Ex. B. In the event that the Department of Correction replaces or modifies any of these policies and/or procedures to comply with Public Act 99-183, copies will be provided to the court in a supplemental filing.

13. The Department of Correction does not conduct any assessment as to whether or not an individual poses any threat to the safety of the community in order to determine whether or not that person is required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*

14. The Office of Adult Probation has in place the following policy and/or procedure pertaining to the registration of and/or community notification regarding individuals required to register pursuant to Public Act 98-111:

a. Connecticut Office of Adult Probation, Sex Offender Notification Policy, dated October 20, 1998.

A copy of the Office of Adult Probation policy and/or procedure is provided as Ex. C. In the event that the Office of Adult Probation replaces or modifies this policy and/or procedure to comply with Public Act 99-183, copies will be provided to the Court in a supplemental filing.

15. The Office of Adult Probation does not conduct any assessment of persons subject to its supervision regarding any threat an individual poses to the safety of the community in order to determine whether or not a person is subject to the registration requirements of Con. Gen. Stat. §§ 250 *et seq.*

III. PUBLIC DISSEMINATION OF INFORMATION.

16. As of the date of this Statement, a direct link to the Department of Public Safety Sex Offender Registry is provided in the "Where Can I Find . . . " section of the "Frequently Asked Questions" section of the official website for the State of Connecticut. Copies of the pages providing these links are provided as Ex. E.

17. The Department of Public Safety Sex Offender Registry website consists of a direct link to search the database for all persons thereon registered pursuant to Public Act 98-111 as well as text providing certain information concerning the website and other direct links. The text section of the Department of Public Safety Sex Offender Registry website also includes a direct link to an e-mail address of the Department of Public Safety Sex Offender Registry Unit.

18. The database can be searched by last name, the first letter of a last name, town name or zip code. Searching the database by the first letter of a last name provides the names of all registrants whose last name begins with the selected letter. Searching the database by any town name or zip code provides the names of all registrants living in that town or zip code.

19. The listing of the name of the registrant provides a direct link to a page entitled "Registered Sex Offender." If the registrant has complied with the registration requirement and there have been no technical difficulties and the Department of Public Safety has had time to post the information, this page contains the name, current residence address as provided by the registrant, a photograph, and physical description.

20. Exhibit F provides a true and complete copy of the text of the Department of Public Safety Sex Offender Registry website prior to late March 1999.

21. Exhibit G provides a true and complete copy of the text of the Department of Public Safety Sex Offender Registry website beginning in approximately April 1999.

22. Individual sex offender listings on the Department of Public Safety Sex Offender Registry website were accessed approximately 3,045,465 times between January 1, 1999 and May 30, 1999. The number of times individual sex offender listings were accessed per month during this period was approximately as follows:

January 1999	1,937,340
February 1999	383,701
March 1999	356,879
April 1999	191,248
May 1999	176,297

23. The Department of Public Safety Sex Offender Registry Unit received a total approximately 92 e-mail messages from members of the public during the month of April, 1999, approximately 76 e-mail messages from members of the public during the month of May, 1999, and approximately 40 e-mail messages from members of the public during the month of June, 1999.

24. Exhibit H provides true and complete copies of website home pages for local television stations that provide direct links to the Department of Public Safety Sex Offender Registry website.

IV. COMMUNITY NOTIFICATION REGARDING SEX OFFENDERS.

25. The Department of Public Safety has in place the following policy and/or procedure pertaining to the public dissemination of information concerning persons registered pursuant to Public Act 98-111:

a. Memorandum to OFO Commanders from Lieutenant Colonel Timothy F. Barry, dated November 16, 1998.

A copy of this policy is provided as Ex. D. In the event that the Department of Public Safety replaces or modifies this policy and/or procedure to comply with Public Act 99-183, copies will be provided to the Court in a supplemental filing.

26. The Department of Public Safety does not have a procedure to permit registrants to contest the necessity of notification to protect the public or any individual in any jurisdiction from the registrant.

27. The Office of Adult Probation has the following policy in place regarding notification of members of the community regarding a person under the supervision of the Office of Adult Probation who has been convicted of a sexual offense: "Residents and/or members of the community will be provided information about sex offenders under those circumstances when it is believed that such notification is necessary to prevent a person from being victimized by the sex offender." A copy of this policy is provided as Ex. C.

28. Other than a court hearing dealing with the issue of notification by the Office of Adult Probation of members of the community with regard to an individual under the supervision of the Office of Adult Probation, there is no formal procedure afforded by the Office of Adult Probation for contesting the necessity of notification to members of the community regarding a person convicted of a sexual offense with whom they may have contact.

V. PUBLIC STATEMENTS REGARDING PERSONS REQUIRED TO REGISTER AS SEX OFFENDERS.

29. The following exhibits accurately reflect statements made in television broadcasts regarding "Megan's Law" or persons designated as "sex offenders."

Ex. I-1 *Tougher Megan's Law Approved* (WTNH television broadcast, May 2, 1998).

Ex. I-2 *Governor Signs Several Bills Into Law* (WTNH television broadcast, Aug. 10, 1998).

Ex. I-3 *Changes Coming to Megan's Law* (WTNH television broadcast, Sept. 30, 1998).

Ex. I-4 *Halloween Safety* (WTNH television broadcast, Oct. 30, 1998).

Ex. I-5 *State Ready to Put Sex Offender Registry on Internet* (WTNH television broadcast, Dec. 29, 1998).

Ex. I-6 *"Megan's Law" list hits the Web* (WVIT/MSNBC television broadcast, Jan. 1, 1999).

Ex. I-7 *Cops Meet to Discuss Missing Persons in Sex Offender Database* (WTNH television broadcast, Feb. 10, 1999).

Ex. I-8 *Megan's Law has real estate agents wondering what they have to disclose* (WTNH television broadcast, May 1, 1999).

Ex. I-9 *Senate gives final approval to Megan's Law bill* (WTNH television broadcast, June 7, 1999).

Ex. I-10 *Text of Gov. John G. Rowland's speech marking the end of the 1999 legislative session* (WTNH television broadcast, June 9, 1999).

30. The following exhibits are accurate copies of articles that have appeared in the press regarding "Megan's Law" or persons designated as "sex offenders."

Ex. J-1 *Family Sees Sex-Offender Bill Signed; "Megan's Law" A Reality*, Hartford Courant, May 31, 1995.

Ex. J-2 *Bill Targets Suspected Abductors*, Hartford Courant, March 1, 1996.

Ex. J-3 *30 Discuss Megan's Law*, Register Citizen, September 24, 1997.

Ex. J-4 *Confusion Causes Varied Access to Data on Sex Offenders,* Hartford Courant, October 10, 1997.

Ex. J-5 *"Megan's Law" and Questions Of Liability,* New York Times, December 14, 1997.

Ex. J-6 *Rallying for Tougher Megan's Law,* Hartford Courant, September 19, 1998.

Ex. J-7 *Publicizing Sex Offenders, State Legislator to Present TV Profiles,* Hartford Courant, October 13, 1998.

Ex. J-8 *Unmasking Sex Offenders,* Bristol Press, October 13, 1998.

Ex. J-9 *Officer Stresses Parent Awareness, Wants Less Focus on Molester Lists,* Hartford Courant, October 17, 1998.

Ex. J-10 *A Contest Focusing on Conduct, Secretary of the State Candidates Assail One Another,* Hartford Courant, October 28, 1998.

Ex. J-11 *Kids' Safety A Key Issue, Widlitz Defends Megan's Law Vote Puffer Has Decried,* Hartford Courant, October 29, 1998.

Ex. J-12 *Sex Offender List Available to All Parents,* Waterbury Republican-American, December 10, 1998.

Ex. J-13 *"Megan's Law": More Harm Than Good?,* Connecticut Law Tribune, December 21, 1998.

Ex. J-14 *Sex Offenders' Names To Be On Internet,* Hartford Courant, December 30, 1998.

Ex. J-15 *Sex offender registration goes online,* New Haven Register, December 30, 1998.

Ex. J-16 *Web Site Lists Sex Offenders; Debate Ensues,* Hartford Courant, January 2, 1999.

Ex. J-17 *Megan's Law Unfair,* Connecticut Law Tribune, January 11, 1999.

Ex. J-18 *Changes Needed In Megan's Law,* Hartford Courant, January 24, 1999.

Ex. J-19 *Many missing from Megan's Law registry,* Journal Inquirer, February 17, 1999.

Ex. J-20 *Megan's Law Effort Opposed,* Hartford Courant, April 14, 1999.

Ex. J-21 *Does Megan's Law need a reality check?,* Waterbury Republican-American, May 2, 1999.

Ex. J-22 *Forum to Explain Details of Megan's Law,* Hartford Courant, May 25, 1999.

Ex. J-23 *House Backs Expanding Megan's Law To Cover More Crimes,* Hartford Courant, June 2, 1999.

31. The following exhibits accurately reflect public statements made by members of the Connecticut General Assembly prior to passage of Public Act 98-111.

Ex. K *Senate Debate on Senate Bill 65, An Act Concerning the Registration of Sexual Offenders* (Apr. 28, 1998).

Ex. L *House of Representatives Debate on Senate Bill 65, An Act Concerning the Registration of Sexual Offenders* (May 2, 1998).

32. The following exhibits accurately reflect public statements made by members of the Connecticut General Assembly prior to passage of Public Act 99-183.

Ex. M *House of Representatives Debate on House Bill 6785, An Act Concerning the Registration of Sexual Offenders* (June 1, 1999).

Ex. N *Senate Debate on House Bill 6785, An Act Concerning the Registration of Sexual Offenders* (June 7, 1999).

Respectfully submitted,

BY: /s/ Ann M. Parrent
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been mailed postage prepaid to Margaret Q. Chapple, Lynn D. Wittenbrink, Assistant Attorneys General, 110 Sherman Street, Hartford, CT 06105 this 9th day of July 1999.

/s/ Ann M. Parrent
Ann M. Parrent

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE *Plaintiff,* — CIVIL ACTION NO. 3:99CV0314(RNC)

VS.

DR. HENRY LEE, ET AL. *Defendants* — SEPTEMBER 13, 1999

LOCAL RULE 9(C)2 STATEMENT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A. Response to Plaintiff's Local Rule 9(c)1 Statement

1. Admitted

2. Admitted

3. It is admitted that as Commissioner of Public Safety, the defendant Commissioner Lee has certain responsibilities in connection with Public Act 98-111, as amended by Public Act 99-183. As the plaintiff alleges that those responsibilities are set forth in As Conn. Gen. Stat. §§ 54-250 *et seq*, and as Conn. Gen. Stat. §§ 54-150 *et seq* are statutory provisions, the defendants neither admit nor deny their content.

4. Admitted

5. Admitted

6. Admitted.

7. As the plaintiff alleges that the defendant Commissioner Armstrong has responsibilities in connection with registration of persons pursuant to As Conn. Gen. Stat. §§ 54-250 *et seq*, and as §§ 54-250 *et seq* are statutory

provisions, the defendants neither admit nor deny their content.

8. Admitted

9. Admitted

10. Admitted.

11. Admitted

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted

17. Admitted

18. Admitted.

19. Admitted.

20. It is admitted that Exhibit F provides a true and complete copy of the text of the Department of Public Safety Sex Offender Registry website along with a copy of the State of Connecticut Department of Public Safety website.

21. It is admitted that Exhibit G provides a true and complete copy of the text of the Department of Public Safety Sex Offender Registry website beginning in approximately late March, 1999, along with a copy of the State of Connecticut Department of Public Safety website.

22. Admitted.

23. Admitted.

24. Admitted

25. Admitted.

26. Admitted.

27. Admitted.

28. Admitted.

29. Admitted.

30. Denied.

31. Admitted.

32. Admitted.

B. Material Facts as to Which there is a Genuine Issue to Be Tried

1. A genuine issue of material facts exists as to whether or not the plaintiff has suffered an adverse consequences as a result of his name and criminal history information being made available Connecticut's Department of Public Safety website that is maintained in accordance with Public Act No. 98-111 as modified by Public Act 99-183.

2. A genuine issue of material facts exists as to the proximate cause of any ill effects the plaintiff claims to have suffered as a result of his name and criminal history information being made available Connecticut's Department of Public Safety website that is maintained in accordance with Public Act No. 98-111 as modified by Public Act 99-183.

DEFENDANTS,
Dr. Henry C. Lee, et al.

RICHARD BLUMENTHAL
ATTORNEY GENERAL

BY: /s/ Lynn D. Wittenbrink
Lynn D. Wittenbrink
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CERTIFICATION

I hereby certify that a copy hereof was mailed this 13th day of September, 1999, first class postage prepaid, to:

Ann Parrent
Connecticut Civil Liberties Union
32 Grand Street
Hartford, CT 06106

/s/ Lynn D. Wittenbrink
Lynn D. Wittenbrink
Assistant Attorney General

Supreme Court, U.S.
FILED
MAY - 3 2002
OFFICE OF THE CLERK

(5)

No. 01-1231

In The

Supreme Court Of The United States

October Term, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C., LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The petitioners hereby reply to Respondent's Brief in Opposition to their petition for certiorari to address briefly the Respondent's claim that no split of authority exists among the circuits or elsewhere. The respondent appears to be alone in this view. The Solicitor and the many amici states feel strongly that this split exists and wish for this Court's guidance on the issues posed. In fact, the Second Circuit itself admitted that its sister circuits have indeed considered the same constitutional issue presented to this Court in the petition for certiorari and decided it differently. *See*, *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied sub nom. Stearns v. Gregoire*, 523 U.S. 1007 (1998).

As discussed in the petitioners' opening brief, Connecticut, like every other state in the union, has enacted a Sexual Offender Registration Act (hereinafter "SORA"). Connecticut's Act requires persons convicted of various sexual and related offenses to "register" with the state law enforcement agency, providing fingerprints, photo, and/or personal information such as address to be included within the State's Sexual Offender Registry. Connecticut, also like every other state, has legislated a manner in which Registry information shall be available to the public, choosing an "information-on-request" system that makes Registry information available both at local police stations and troops and on-line. Although a number of states have chosen a system for information dissemination similar to Connecticut's, other states have implemented tiered systems, whereby convicted offenders are ranked in categories attempting to relate to the likelihood of their re-offense, and then various

levels of information on different registrants are either provided or made available to the public depending on the determination of that likelihood. Some states have mixed versions of these two models. See Petitioners' brief, pp. 14-16.

The plaintiff challenged Connecticut's law as violating his right to procedural due process. Acknowledging the "stigma-plus" test enunciated in *Paul v. Davis,* the plaintiff claimed that Connecticut's web site falsely "stigmatized" him by making accurate information available to the public along with accurate information regarding other convicted sexual offenders, and thus "implying" that he is currently dangerous. The plaintiff originally argued that the "plus" element in Connecticut's statutory scheme could be found in all of several negative effects allegedly inuring to the registrant as a result of the availability of Registry information, claiming but never having to prove a negative effect on employment prospects, family relationships, harassment or abuse of registrants, and an alleged Connecticut constitutional right to reputation. A-56, n. 23.[1/] In addition, the plaintiff alleged that the underlying registration requirements themselves, that is, the requirements surrounding the provision of information by a registrant about himself to the Connecticut State Police, such as the provision and update of address information as well as the production of a photograph at least every 5 years, or be subject to arrest for a

---

[1/] See, Fourth Am. Comp. ¶ 79(f), Pl. App. 19, alleging "a multitude of possible adverse consequences...including shame, humili[]ation, ostracism, loss of employment, decreased employment opportunities, loss of housing, interference with family and social relationships, and *possible* physical harm inflicted by members of the public who believe that plaintiff and the class members pose a threat to public safety." (emphasis added).

Class D felony,[2/] satisfied the "plus" portion of the *Paul v. Davis* liberty interest test, that, when coupled with the availability of information, was sufficient to invoke procedural due process protection. It was this argument that the courts below accepted, despite the fact that both the existence of the "stigma" and the "plus" were highly questionable under a conscientious application of *Paul v. Davis* and its progeny. The due process analyses of both courts below are flawed in that they find "stigma" in an "implication" of dangerousness, despite explicit language to the contrary, and stretch to find that the "plus" element is satisfied in the registration requirements, which do not flow from the Registry that the district court shut down and made publicly inaccessible.

The Second Circuit conceded: "It is true that the Sixth and Ninth Circuits have not found a liberty interest in analogous circumstances. *See Cutshall; Russell v. Gregoire, supra*. A substantial number of District Courts have held similarly." A-32, citations omitted. Attempting to minimize the distinction, the Second Circuit then stated, "However, these Courts have *not necessarily disagreed* with the contention that the ongoing legal obligations of sex offenders registrants constitute a 'plus' factor. Neither the Sixth Circuit in *Cutshall* nor the Ninth Circuit in *Russell* was presented with such an argument." A-32-33 (emphasis

---

[2/] The plaintiff argues, as did the Second Circuit, that the cumulative nature of the registration requirements for a variety of criminal offenses render the statute unconstitutional. Pl. Br. at 15, citing *Doe v. Dep't of Public Safety*, 271 F.3d at 57 ("These obligations taken together easily qualify as a 'plus' factor under *Paul v. Davis.")* This argument is disingenuous at best, as the plaintiff is certainly unlikely to concede that paring down either the registration requirements or the list of criminal offenses requiring registration would make Connecticut's law constitutionally sound.

added). Although those cases themselves did not address the narrow question of whether or not the registration requirements were sufficient to satisfy the "plus" portion of the "stigma-plus" test, it is indisputable that both Tennessee (*Cutshall*) and Washington (*Russell*) have and had registration requirements similar to those of Connecticut in place for sex offenders.[3/] Moreover, it is indisputable that both

---

[3/] The Tennessee law at issue in *Cutshall* required:

> [E]ach sexual offender shall complete a . . . sexual offender registration/monitoring form and shall cause such form to be delivered to TBI headquarters in Nashville. Sexual offender registration/monitoring forms shall require disclosure of the following information: 1) Complete name as well as any alias; 2) Date and place of birth; 3) Social security number; 4) State of issuance and identification number of any valid driver license; 5) For a sexual offender on supervised release, the name, address, and telephone number of the registrant's parole Officer, probation Officer, or other person responsible for the registrant's supervision; 6) Sexual offense or offenses of which the registrant has been convicted; 7) Current place and length of employment; 8) Current address and length of residence at such address; 9) Such other registration and/or monitoring information as may be required. .

Cutshall, 193 F.3d at 470. The Washington law in *Russell* required:

> Any person convicted of a sex offense . . . [must] register with the sheriff for the county of the person's residence. Wash. Rev. Code § 9A.44.130(1). The offender must provide his or her name, address, date and place of birth, place of employment, crime for which he or she was convicted, date and place of conviction, aliases used, and social security number. . . . The sheriff must obtain a photograph and a copy of the offender's fingerprints. . . . The information is forwarded to the Washington State Patrol for inclusion in a central registry. . . . *Failure to register within the time required is punishable as a Class C felony or gross misdemeanor depending on the degree of the offender's underlying sex offense.* *Id.* at § 9A.44.130(7).

Russell, 124 F.3d at 1082 (emphasis added). Connecticut's SORA does not require registrants to provide employment information. A-78-103.

the Sixth and Ninth Circuits considered the same legal issue as the Second Circuit considered: whether a statutory scheme involving the provision of registration information by sex offenders to the State and the subsequent provision of that registration information by the State to members of the public[4/] collectively amounts to a violation of the offender's right to procedural due process. More specifically, all three Circuits specifically considered whether or not such a statutory registration scheme satisfies the "stigma plus" test for a liberty interest sufficient to invoke due process that this Court set forth in *Paul v. Davis,* 424

[4/] The plaintiff claims that the petitioners' argument regarding access to public information is an "Eleventh Hour Effort to Recharacterize" their arguments that were previously all based in "public safety". Pl. Br. at 22-24. This is blatantly untrue. The State of Connecticut has consistently argued the public information aspects of this case at every level. In both submissions below, the petitioners argued that Connecticut Freedom of Information laws required public accessibility to the electronically maintained Registry and that the Registry Internet web site simply made already public information more easily accessible to the public. (Defendants' Brief Below at 8-9, citing Conn. Gen. Stat. §§ 1-210; 54-142k(b); and 1-211 (regarding public accessibility to computer stored records); (Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment 10-11.) In addition, this argument is irrelevant to the appropriateness of certiorari.

U.S. 693 (1976). *See, Doe v. Public Safety,* A-14-A-33; *Cutshall*, 193 F.3d at 479-480;[5/] *Russell*, 124 F.3d at 1094.[6/]

[5/] In *Cutshall*, the Sixth Circuit considered the existence of a liberty interest in light of the plaintiff's allegations in that case that Tennessee's SORA "deprive[d] him of employment and privacy". 193 F.3d at 479. The Sixth Circuit did not find the employment argument persuasive, noting that Tennessee did not place any restriction on private employment. *Id.* at 479. The Sixth Circuit noted further that Tennessee's registration law did not prevent registrants from obtaining *government* employment. *Id.* Without a significant deprivation such as loss of employment due to government restriction, the Sixth Circuit correctly applied *Paul v. Davis* in determining that the plaintiff had failed to invoke a liberty interest.

The plaintiff attempts to distinguish *Cutshall* further by arguing that under Tennessee law, Registry information was not made available on an Internet web site about all registrants, but was released on a case-by-case basis "as deemed necessary to protect the public concerning a specific sexual offender". Pl. Brief at 19, citing *Cutshall*, 193 F.3d at 471. This distinction does not diminish the split of authority on the due process issue between the Second Circuit and the Sixth. To the contrary, the Sixth Circuit found that no due process was necessary prior to the release of information regarding one particular registrant. *Id.* As Tennessee at the time did not have a Internet web site, this "release of information", or active notification by law enforcement, might carry to those receiving the information the implication of current dangerousness regarding that registrant more than would a registrant's inclusion on an Internet web site with hundreds of others.

The same is true in *Russell,* where the plaintiffs challenged more extensive notification. Washington distributed forms containing personal information as well as a summary of the crime to local schools, Block Watch Captains, and to the local media. 124 F.3d at 1082-83. Despite this much more likely to be stigmatizing notification, the Ninth Circuit found no liberty interest adhered to plaintiffs. Respondent presents a far less compelling claim, yet presently enjoys superior protection.

[6/] In *Russell*, the Ninth Circuit, while admittedly dispatching quickly the plaintiff's due process claim (as was appropriate), did indeed apply a due process analysis to Washington's SORA.

The result is a classic split among the circuits: citizens operating under the same Constitution and similar laws that have been adjudicated differently by different courts of appeals. This split is significant, and results from the efforts of all states to inform and protect their citizens, and not incidentally to comply with the federal government's announced policy and law doing the same. It is difficult to imagine a circuit split having more of a national impact than this case.

Respectfully submitted,
Petitioners,

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Supreme Court, U.S.
FILED
APR 15

(3)

No. 01-1231

In the Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, ET AL., PETITIONERS

v.

JOHN DOE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prevents a State from listing convicted sex offenders in a publicly disseminated registry without first affording such offenders individualized hearings on their current dangerousness.

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In the Supreme Court of the United States

No. 01-1231

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, ET AL., PETITIONERS

v.

JOHN DOE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The court of appeals in this case held that Connecticut's sex offender registration and notification law—its "Megan's law"—violates the Due Process Clause of the Fourteenth Amendment. The Connecticut law requires those convicted of sex offenses to register with the State upon their release into the community, and provides for public dissemination of the sex offender registry. The court of appeals invalidated that law on the ground that due process entitles convicted sex offenders to an individualized hearing on their current dangerousness before a State may include them in a publicly disseminated registry.

The Megan's law at issue in this case qualifies Connecticut to receive federal funding pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender

Registration Program (Wetterling Act), 42 U.S.C. 14071 (1994 & Supp. V 1999). The Wetterling Act establishes minimum national standards for state sex offender registration and notification laws. In particular, the Act directs States to "release relevant information that is necessary to protect the public concerning a specific person required to register under [the Act]." 42 U.S.C. 14071(e)(2) (Supp. V 1999). States that do not meet the Act's minimum standards are ineligible to receive ten percent of a formula grant to which they are otherwise entitled under the Edward Byrne Memorial State and Local Law Enforcement Program, 42 U.S.C. 3756. See 42 U.S.C. 14071(g)(2)(A) (Supp. V 1999).

The Attorney General has issued guidelines implementing the Wetterling Act. 64 Fed. Reg. 572 (1999). The guidelines permit States to choose among different methods for classifying sex offenders and notifying the public of registered offenders. In particular, the guidelines provide that "States * * * are free under the Act to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." *Id.* at 582. The guidelines also permit States to make "particularized risk assessments of registered offenders," and notify the community depending on an offender's particularized risk level. *Ibid.*

All 50 States have enacted Megan's laws. More than 20 States, including Connecticut, have chosen to adopt the categorical notification approach expressly permitted by the Justice Department Guidelines under which the State's database of registered sex offenders is publicly disseminated, without any individualized risk assessments. See note 4, *infra*. In addition, Congress has enacted the Campus Sex Crimes Prevention Act of 2000 (CSCPA), Pub. L. No. 106-386, § 1601, 114 Stat. 1537, amending 42 U.S.C. 14071(j) and 20 U.S.C. 1092(f)(1) (1994 & Supp. V 1999). That Act, which

takes effect in October 2002, requires States to ensure community notification with respect to all registered sex offenders that are enrolled in or employed by an institution of higher education, without regard to individualized risk assessments. See 20 U.S.C. 1092 note; H.R. Conf. Rep. No. 939, 106th Cong., 2d Sess. 110 (2000).

The United States has a strong interest in defending the constitutionality of Megan's laws such as Connecticut's that comply with the federal guidelines, and in defending the constitutionality of the notification provision of the CSCPA, which operates in a fashion similar to Connecticut's program. More generally, the federal government has a substantial interest in ensuring that policymakers in the States and Congress may choose among all available and permissible means in determining how to protect communities, and in particular children, from sex offenders.

STATEMENT

1. Sex offenders inflict an immense toll on this Nation and its citizens. In 1995, nearly 355,000 rapes and sexual assaults were reported nationwide by victims older than 12 years. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* (1997); see U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* 24 (1999).[1] Between 1980 and 1994, the average number of individuals imprisoned for sex offenses increased at a faster rate than that for any other category of violent crime. *Sex Offenses and Offenders* 18. In 1994, nearly 100,000 inmates were serving time in state prisons for rape or sexual assault; another 134,000 convicted sex offenders were under community supervision, such as probation or parole. *Id.* at 15.

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[1] These figures understate the incidence of sex offenses because many sex offenses go unreported and others involve children under the age of 12, who are not covered by this survey.

More than 42,000 of those inmates victimized children. U.S. Dep't of Justice, Bureau of Justice Statistics, *Child Victimizers: Violent Offenders and Their Victims* 2 (1996).

Even when they do not result in serious physical injury or death, sexual assaults inflict enormous harm on victims, especially children. Children who are sexually assaulted are more likely than other children to develop severe psychosocial problems, including depression, antisocial and suicidal behavior, and substance abuse, and are more likely to become involved in abusive relationships. See J. Briere & M. Runtz, *Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment*, 8 J. of Interpersonal Violence 312, 324 (Sept. 1993). In addition, children who are sexually assaulted are more likely than other youths to become sex offenders as adults. *Id.* at 312.

Convicted sex offenders are much more likely to recommit sex offenses than any other type of felon. See *Sex Offenses and Offenders* 27; U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* 6 (1997). One study of 16,000 state prisoners showed that within just three years of release, 7.7% of released rapists had been rearrested for rape, and 27.5% of released rapists had been rearrested for another violent offense, including murder. *Id.* at 3. Released rapists were 10.5 times more likely to be rearrested for the crime of conviction than other released prisoners; likewise, prisoners who had served time for other sexual assaults were 7.5 times more likely than other released prisoners to be rearrested for the crime of conviction. *Ibid.* Those who commit sex offenses against children present an even heightened risk of recidivism. See *Child Victimizers* 9-10.

Like every other State, Connecticut has enacted a Megan's law designed to protect its communities from sex offenses, assist law enforcement authorities in apprehending sex offenders, and comply with federal funding mandates.

The Connecticut law requires persons convicted of certain offenses, the vast majority of which are sex-based, to register with the Connecticut Department of Public Safety (CDPS or State) upon their release into the community. Registrants must provide their name and address, identifying information such as a photograph and DNA sample, and certain other information. The registration requirement runs for ten years, except that those convicted of sexually violent offenses must register for life. Covered individuals must re-register when they move, and periodically must submit an updated photograph. See Conn. Gen. Stat. Ann. §§ 54-251, 54-252, 54-254 (West 2001); Pet. App. A5-A7.[2]

The Connecticut law requires the CDPS to compile the information gathered from registrants and to share it with law enforcement authorities and the public. In particular, the law requires CDPS to post a sex offender registry on an Internet website and make it available to the public in certain state offices. See Conn. Gen. Stat. Ann. §§ 54-257, 54-258 (West 2001); Pet. App. A7-A9. Whether made available in person or via the Internet, the registry must be accompanied by the following warning: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." Conn. Gen. Stat. Ann. § 54-258a (West 2001).

In Connecticut, as in most other States, the Internet served as the primary means of accessing the State's sex offender registry. The State's website enabled citizens to obtain the name and address, photograph, and physical description of any registered sex offender by entering a zip

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[2] In certain instances not at issue here, a court may determine that "registration is not required for public safety." Conn. Gen. Stat. Ann. § 54-251(b) and (c) (West 2001); see Pet. App. A10.

code or town. Pet. App. A8-A9. The following disclaimer appeared on the first page of the website:

> The registry is based on the legislature's decision to facilitate access to publicly available information about persons convicted of sexual offenses. The [CDPS] has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.

Id. at A9.

3. Respondent is a Connecticut resident who has been convicted of an offense that is covered by Connecticut's Megan's law. In 1999, he filed this Section 1983 action on behalf of himself and similarly situated individuals, claiming that the Connecticut law violates the Due Process Clause of the Fourteenth Amendment. Respondent alleged that he is not a "dangerous sexual offender," and that the Connecticut law "deprives him of a liberty interest—his reputation combined with the alteration of his status under state law—without notice or a meaningful opportunity to be heard." Pet. App. A11. The district court granted summary judgment for respondent on his due process claim. *Id.* at A41-A66. Shortly thereafter, the court issued an order certifying a class of individuals subject to Connecticut's Megan's law, and permanently enjoining the public notification provisions of that law. *Id.* at A67-A69.

4. The Second Circuit affirmed. Pet. App. A1-A40. The court stated that the due process claim was "govern[ed]" (*id.* at A14) by *Paul* v. *Davis*, 424 U.S. 693 (1976). According to the court, to prevail under *Paul*'s "'stigma plus' test," respondent was required to show that the State made a "stigmatizing statement" about him that he claimed was false; and "some tangible and material state-imposed burden or alteration of his * * * status or of a right in addition to the stigmatizing statement." Pet. App. A14.

Applying that formulation of *Paul*, the court of appeals found that, although the information listed on the State's registry is "concededly true," Pet. App. A15, the registry conveys the "stigma" that "each person listed is more likely than the average person to be currently dangerous." *Id.* at A18. According to the court, the website's disclaimer did not remove that asserted stigma, but instead contributed to it. See *id.* at A17 ("Even the disclaimer itself, by asserting that the DPS 'has made no determination that any individual included in the Registry is currently dangerous,' clearly implies that some may be.").

Although the court stated that "the import of the 'plus' component [of *Paul*] remains somewhat unclear," Pet. App. A20, it further concluded that the "registration duties" under Connecticut's Megan's law, which it characterized as "extreme and onerous," "easily qualify as a 'plus' factor under *Paul*," *id.* at A30-A31. In so holding, the court recognized that "the Sixth and Ninth Circuits have not found a liberty interest [under *Paul*] in analogous circumstances." *Id.* at A32 (citing *Cutshall* v. *Sundquist*, 193 F.3d 466, 479-480 (6th Cir. 1999), cert. denied, 529 U.S. 1053 (2000); and *Russell* v. *Gregoire*, 124 F.3d 1079 (9th Cir. 1997), cert. denied, 523 U.S. 1007 (1998)).

The court of appeals affirmed the district court's injunction against the notification provisions of the Connecticut law, and stated that "[respondent] and members of the due process class are entitled to the opportunity to have a hearing consistent with due process principles to determine

whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in the publicly disseminated registry." Pet. App. A39.[3]

ARGUMENT

The Second Circuit's decision in this case holding that Connecticut's Megan's law violates the Due Process Clause casts doubt on the validity of the federal guidelines issued pursuant to the Wetterling Act, which specifically endorse the type of categorical notification approach invalidated by the court. More than 20 States have adopted versions of Megan's law that require community notification based on the fact of an individual's prior conviction for a sex offense, rather than an individualized, post-conviction risk assessment. In addition, the CSCPA directs all States to begin using a similar notification approach next fall with respect to registered sex offenders who enter a campus community.

The Second Circuit's decision in this case also conflicts with this Court's precedents, including *Paul* v. *Davis*, 424 U.S. 693 (1976), and with the decisions of other circuits. In light of the vital importance of Megan's laws to public safety and the demonstrated interest of both federal and state legislators in addressing the serious problem of recidivism among convicted sex offenders, this Court should resolve that conflict now and provide needed guidance on whether the Constitution prevents a State from affording its citizens access to its sex offender registry unless it first guarantees each registered sex offender an individualized hearing on his current dangerousness.

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[3] Respondent also alleged that the Connecticut law subjects him to an additional punishment for conduct that preceded the date on which the law took effect, in violation of the Ex Post Facto Clause. U.S. Const. Art. I, § 10. The district court rejected that claim, Pet. App. A57, and the court of appeals did not reach it, see *id.* at A38. Accordingly, the State has not presented the ex post facto issue to this Court. See Pet. i.

A. The Question Presented Is Of National Importance

Megan's laws serve vital government interests by assisting law enforcement and enabling American communities to better protect themselves, and in particular their children, from sex offenses. As discussed above, Congress has sought to encourage all States to enact Megan's laws by tying state eligibility for federal funding to the enactment of sex offender registration and notification provisions that meet minimum national standards. The federal guidelines promulgated pursuant to the Wetterling Act specifically provide that States "are free under the Act" to notify the public of registered sex offenders on a categorical basis depending on the fact of conviction for a particular offense. 64 Fed. Reg. at 582. More than 20 States, including Connecticut, have opted to follow such a categorical notification approach.[4]

The federal guidelines also permit States to notify communities of registered sex offenders based upon a "particularized risk assessment[] of [such] offenders." 64 Fed. Reg. at 582. States like Connecticut, however, have concluded

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[4] See, *e.g.*, Ala. Code §§ 15-20-21(1), 15-20-25(b) (Supp. 2000); Del. Code Ann. tit. 11, § 4121(e) (Supp. 2000); D.C. Code § 22-4001 (2001); Fla. Stat. Ann. §§ 943.043(1), 943.0435(1)(a) (West 2001); Ga. Code Ann. § 42-9-44.1 (1997); Haw. Rev. Stat. § 846E-3 (Supp. 2000) (invalidated in *State* v. *Bani*, 36 P.3d 1255 (Haw. 2001)); 173 Ill. Comp. Stat. Ann. 152/115, 152/120(c) (West Supp. 2001); Ind. Code Ann. § 5-2-12-11(b) (Michie 2001); La. Rev. Stat. Ann. § 15:546 (West 2001); 2001 Md. Laws ch. 10, § 2 (revising Md. Ann. Code art. 27, § 792 (Supp. 2000)); Mich. Comp. Laws Ann. § 28.728(2) (West 2001); Miss. Code Ann. § 45-33-49 (Supp. 2001); Mo. Ann. Stat. § 589.417(2) (West Supp. 2002); N.M. Stat. Ann. § 29-11A-5.1 (Michie 2000); N.C. Gen. Stat. § 14-208.15 (1993); Okla. Stat. Ann. tit. 57, § 584(E) (West Supp. 2002); Or. Rev. Stat. § 181.592 (1999); S.C. Code Ann. Rev. § 23-3-490 (2002); Tenn. Code Ann. § 40-39-106(f) (1997); Tex. Code Crim. P. Ann. art. 62.08 (West Supp. 2002); Utah Code Ann. § 77-27-21.5 (2001); Va. Code Ann. § 19.2-390.1(B)-(D) (Michie 2002); W. Va. Code § 15-12-2(h) (2000); and Wis. Stat. Ann. § 301.46(5) (West 1999); see generally *Helman* v. *State*, 784 A.2d 1058, 1065-1066 & n.2 (Del. 2001) (citing state statutes).

that basing community notification on an individualized assessment concerning each convicted sex offender's "likelihood to reoffend" is "costly, cumbersome and inaccurate," and such States have therefore have declined "to distinguish the level of information [made available to the public] with regard to any individual registrant based upon any such [assessment]." Pet. 4-5. That is a judgment that the federal guidelines plainly permit States to make and, as discussed below, is one that is amply supported by experience and common sense. See pp. 15-16, *infra*.

The court of appeals in this case acknowledged that "Connecticut's registration and notification system is compliant with * * * the federal standards," Pet. App. A5 n.5, but held that the Due Process Clause nonetheless required the State to afford convicted sex offenders an individualized hearing "to determine whether or not they are particularly likely to be currently dangerous" before listing them in its publicly disseminated registry, *id.* at A39. Thus, although the federal guidelines were not directly challenged in this case, the decision below effectively holds that the Constitution forbids what the federal guidelines permit.

Likewise, if followed, the decision in this case would cast serious doubt on the notification provision of the CSCPA, which takes effect this October. In enacting the CSCPA, Congress directed States to provide for community notification with respect to *all* registered sex offenders enrolled in or employed by an institution of higher education, without regard to particularized risk assessments. See pp. 2-3, *supra*. The CSCPA, therefore, will be under a constitutional cloud in the Second Circuit as soon as it takes effect. As a result, scores of college communities in the Second Circuit alone could be adversely affected by the decision in this case.

B. The Court Of Appeals' Decision Conflicts With This Court's Decisions

The Second Circuit's decision below conflicts with this Court's precedents in at least two fundamental respects.

1. The decision conflicts with this Court's decision in *Paul* v. *Davis*, *supra*, which—as the Second Circuit recognized—most directly "governs" this case. Pet. App. A14. *Paul* involved an individual, Davis, whose name and photograph were included on a police flyer of "Active Shoplifters," following his arrest for shoplifting. 424 U.S. at 695. After the shoplifting charge was dismissed, Davis brought suit under Section 1983 against the officers responsible for the flyer, claiming that the public distribution of the flyer had inflicted a stigma on his reputation that would "seriously impair his future employment opportunities," and thereby deprived him of a "'liberty' protected by the Fourteenth Amendment." *Id.* at 697; see *id.* at 699.

This Court disagreed, and held that the interest in one's reputation, standing alone, is not protected by the Due Process Clause. See 424 U.S. at 711-712. The Court explained that the customary recourse for "the infliction by state officials of a 'stigma' to one's reputation" is state defamation law. *Id.* at 701. To trigger due process guarantees, an individual must show that he has been deprived of an interest that is "recognized and protected by state law." *Id.* at 710. That is, an individual must show that "*as a result of the state action complained of*, a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711 (emphasis added). Davis failed to make such a showing, the Court held, because he did not "assert denial of any right vouchsafed to him by the State," but instead only a harm to his reputation. *Id.* at 712.[5]

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[5] The Court reaffirmed that understanding of *Paul* in *Siegert* v. *Gilley*, 500 U.S. 226 (1991). See *id.* at 233-234. In *Siegert*, the Court held

By contrast, as the Court explained in *Paul*, the plaintiff in *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), suffered a change in status that triggered due process. *Constantineau* involved a challenge to a state law that required the "posting" of the names of individuals deemed to pose a community risk by reason of "excessive drinking." *Id.* at 434-435. The law further made it unlawful to sell or give liquor to "posted" individuals. *Id.* at 434 n.2. As the Court explained in *Paul*, the "posting" at issue in *Constantineau* "significantly altered [an individual's] status as a matter of state law" by depriving him of "the right to purchase or obtain liquor in common with the rest of the citizenry," and "it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." 424 U.S. at 708-709.

The "state action complained of" (*Paul*, 424 U.S. at 711) in this case is community notification of respondent's inclusion in the State's sex offender registry, and the alleged stigma flowing therefrom. See Pet. App. A18.[6] To trigger due process protections under *Paul*, respondent was required to show the material alteration in a state entitlement or right "as a result of" the notification of his registered sex offender status. 424 U.S. at 711. In holding that respondent met that

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that the plaintiff had failed to state a claim under the Fourteenth Amendment based on an allegedly defamatory letter sent by his former government employer to a prospective employer. In so holding, the Court reiterated that "[d]efamation, by itself, is * * * not a constitutional deprivation," and concluded that, under *Paul*, the plaintiff had failed to state a claim, even though "[t]he statements contained in the letter would undoubtedly damage the reputation of one in his position, and impair his future employment prospects." *Id.* at 233-234.

[6] As the court of appeals recognized, it is "[p]ublication of the Connecticut Sex Offender Registry" that "stigmatizes" the listed sex offenders. Pet. App. A18. Thus, the injunction affirmed below is "limited to public disclosure of the sexual offender registry." *Id.* at A38.

test, the Second Circuit pointed to the "registration duties imposed by Connecticut's sex offender law." Pet. App. A30. But that analysis confuses cause and effect. Registration is not a result of notification—*i.e.*, the complained of action. Just the opposite is true. Moreover, the effect on respondent would be no different if the State notified the community of the fact of his conviction, rather than the fact of his registration. In either case, no change in state law status is triggered by the notification. Like Davis, respondent was not "deni[ed] * * * any right vouchsafed to him by the State" as a result of the complained of action and, so too, he was not deprived of any interest protected by the Fourteenth Amendment. *Id.* at 712.

The Second Circuit held that *Paul*'s "plus factor" is met if a plaintiff "points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit." Pet. App. A29. That is a substantial deviation from the line drawn by *Paul*, and provides virtually no limiting principle against transforming ordinary defamation claims against a State into constitutionally recognized defamation claims. Indeed, if all that is required to trigger due process protections is "an indicium of material government involvement unique to the government's public role," then the State's public role in notifying the community of individuals who have been apprehended for particular offenses (*e.g.*, shoplifting) as part of legitimate law enforcement efforts also would trigger the Fourteenth Amendment. But *Paul* teaches that the contrary is true.[7]

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[7] This case is an even *less* likely candidate than *Paul* for finding a constitutionally recognized tort. The police flyer in *Paul* identified Davis as an "Active Shoplifter," even though he had only been *charged* with shoplifting when it was distributed. 424 U.S. at 696. Moreover, "[s]hortly after circulation of the flyer," that charge was dismissed. *Ibid.* By contrast, this case involves public dissemination of information that is

2. Even assuming (contrary to the analysis above) that the challenged state action in this case implicates an interest protected by the Fourteenth Amendment, the Second Circuit's decision holding that respondent was entitled to an individualized hearing with respect to his current dangerousness nonetheless conflicts with this Court's decisions. As the plurality recognized in *Michael H.* v. *Gerald D.*, 491 U.S. 110, 120 (1989), States are not barred by principles of "*procedural* due process" from establishing a "conclusive presumption" or "general classification[]" that "foreclose[s] the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will not in fact further the lawful governmental policy the presumption is designed to effectuate." *Ibid.* Rather, such classifications, when they implicate protected interests, are limited only by *substantive* due process. *Id.* at 120-121.

Michael H. involved a challenge brought by the putative natural father to a state law establishing a conclusive presumption that the husband of the mother who was living with the mother was the "father" of the mother's child. 491

"concededly true." Pet. App. A15. The court of appeals accepted respondent's allegation that Connecticut's sex offender registry falsely implies that he is a "presently dangerous sex offender." *Ibid.* Even that alleged stigma, however, was dispelled by the disclaimer on the State's Internet website. In any event, the source of the alleged stigma here is not the registry, but rather the undisputed fact of respondent's *conviction* for a sex offense. This Court has never suggested that the Constitution is implicated by any stigma that may stem from the publication of truthful information, or that an individual is entitled to an individualized hearing before a State may publish such information for plainly legitimate public purposes. *Codd* v. *Velger*, 429 U.S. 624, 627 (1977). To the contrary, the Court has recognized that the public interest may be *served* by disseminating truthful information obtained from court records. See *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 493, 495-496 (1975). And, in *Paul* itself the Court rejected the argument that the Constitution prevents a State from "publiciz[ing] a record of an official act such as an arrest." 424 U.S. at 713.

U.S. at 116-118. The plurality rejected the putative father's procedural due process argument that he was entitled to an "opportunity to demonstrate his paternity in an evidentiary hearing" before the State applied the foregoing rule to him, and terminated his parental rights. *Id.* at 119. Instead, the plurality reasoned that such a challenge "must ultimately be analyzed" under principles of substantive due process by looking to "the adequacy of the 'fit' between the classification and the policy that the classification serves." *Id.* at 121. Justice Stevens, who concurred in the judgment in *Michael H.*, joined the portion of the plurality decision rejecting the procedural due process claim. See *id.* at 132.

Similarly, here, to the extent that the State's decision to notify the public of *all* registered sex offenders (without any individualized inquiry into their present dangerousness) implicates any liberty interest enjoyed by respondent, that decision is at most subject to challenge under principles of substantive due process. When, as here, a classification does not infringe on a fundamental right or discriminate against a suspect class, it is subject to rational basis review, which looks deferentially to the "the 'fit' between the classification and the policy that the classification serves." *Michael H.*, 491 U.S. at 121; see *Washington* v. *Glucksberg*, 521 U.S. 702, 728 (1997). Connecticut's decision to notify communities of all registered sex offenders is clearly rationally related to legitimate state objectives, and thus satisfies due process.

As the court of appeals recognized, Connecticut's Megan's law serves the important government objectives of protecting the public and assisting law enforcement. See Pet. App. A17. The State's categorical notification requirement is directly related to those objectives. Indeed, experience teaches that the fact that an individual has been convicted of a sex offense is perhaps the most significant factor for gauging his risk of committing another sex offense upon his release. See U.S. Sentencing Commission, *Report to the*

Congress: *Sex Offenses Against Children* 34 (June 1996) ("The most consistent finding is that criminal history, especially a history of sexual offenses, is the most important and accurate predictor of the risk of future sexual offending."); p. 4, *supra*. Moreover, any substantive due process claim in this case is particularly weak because, unlike in *Michael H.*, where parental rights were at stake, the only consequence of any presumption in Connecticut's categorical approach is public dissemination of truthful information, with individuals free to draw their own conclusions from that information.[8]

In short, nothing in the Due Process Clause requires a State individually to attempt to assess the particular degree of danger posed by each sex offender before it may publicly disseminate a registry of convicted sex offenders.

C. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Circuits

As the Second Circuit recognized, the decision in this case also conflicts with the decisions of other circuits. See Pet. App. A32. Those decisions, moreover, underscore the conflict between the decision below and *Paul*.

In *Russell* v. *Gregoire*, 124 F.3d 1079 (1997), cert. denied, 523 U.S. 1007 (1998), the Ninth Circuit rejected a constitutional challenge to the notification provision of Washington's Megan's law. Although the plaintiffs in that case framed their challenge in terms of a violation of "their right to privacy," in rejecting that claim the Ninth Circuit expressly relied upon this Court's decision in *Paul*, and reasoned that "[t]he collection and dissemination of information under the

[8] Following a categorical notification approach with respect to all registered sex offenders may encourage citizens to make their own judgments about the risks posed by particular sex offenders, without the imprimatur of a state determination that a particular offender poses a particular danger to his community based on the outcome of an individualized risk assessment.

Washington law * * * does not amount to a deprivation of liberty or property" under *Paul*. *Id.* at 1093-1094.

In *Cutshall* v. *Sundquist*, 193 F.3d 466, 478 (1999), cert. denied, 529 U.S. 1053 (2000), the Sixth Circuit rejected a procedural due process challenge to Tennessee's Megan's law, which was based on the plaintiff's assertion that the Tennessee law "infringe[d] protected liberty interests because it imposes punishment" and "subjects him to stigmitization and loss of employment." In so holding, the court emphasized that, under *Paul*, "reputation alone is not a constitutionally protected liberty or property interest" and that, to establish such an interest, "a plaintiff must show that the 'governmental action taken * * * deprived the individual of a right previously held under state law.'" *Id.* at 479 (citing *Paul*, 424 U.S. at 708).

The Second Circuit below acknowledged that *Russell* and *Cutshall* found no "liberty interest in analogous circumstances." Pet. App. A32. But the Second Circuit stated that the courts in *Russell* and *Cutshall* did not "necessarily disagree[] with the contention that the ongoing legal obligations of sex offender registrants constitute a 'plus' factor" under *Paul*. *Id.* at A31-A32. That is true only insofar as those courts did not explicitly reject, because they did not consider, the novel ground on which the Second Circuit rested its decision below. The Megan's laws challenged in *Russell* and *Cutshall* imposed the same type of registration duties as the Connecticut law in this case, but neither the Ninth nor Sixth Circuit regarded those duties as sufficient to trigger due process protections with respect to notification.[9]

[9] As the Second Circuit recognized, a "substantial number of district courts" also have rejected similar due process challenges to Megan's laws. Pet. App. A32; but see *Doe* v. *Williams*, 167 F. Supp. 2d 45, 55 (D.D.C. 2001) (holding that the notification provisions of District of Columbia's Megan's law violate procedural due process), appeal pending, No. 01-7162 (D.C. Cir. filed Feb. 21, 2002). The number of decisions involving due

D. *Otte* v. *Doe*, No. 01-729, Presents No Occasion To Resolve The Due Process Issue Presented By This Case

On February 19, 2002, this Court granted certiorari in *Otte* v. *Doe*, No. 01-729. The question in *Otte* is whether Alaska's Megan's law imposes punishment for purposes of the Ex Post Facto Clause. 01-729 Pet. at i. The Ninth Circuit held that the registration and notification provisions of Alaska's Megan's law violate the Ex Post Facto Clause by increasing the punishment for sex offenses for those who committed offenses prior to its enactment. See 01-729 Pet. App. at 30a-31a. The Ninth Circuit in *Otte* expressly declined to "resolve the question of whether [the Alaska law] also violates the Due Process Clause." See 01-729 Pet. App. at 2a.[10] As a result, *Otte* does not present an opportunity for the Court to address the important question presented here.

CONCLUSION

Granting certiorari in this case would enable the Court to provide guidance on the application of due process principles to Megan's laws, and provide additional clarity in this vitally important area. Given the recurring nature of litigation in the federal courts over the constitutionality of Megan's laws, it seems inevitable that this Court will have to address whether due process bars categorical community notification provisions such as those at issue in this case. Legislators in the States and Congress seeking to protect citizens from sex offenses would benefit from guidance from the Court on whether categorical notification is one of the measures available to them in undertaking such efforts.

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process challenges to Megan's laws underscores the important and recurring nature of the question presented here.

[10] Conversely, as noted above, the Second Circuit in this case did not reach respondent's ex post facto argument. Pet. App. A38.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 01-1231

IN THE

Supreme Court of the United States

CONNECTICUT DEPT. OF PUBLIC SAFETY, *ET AL.*,

Petitioners,

v.

JOHN DOE, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE*, THE DISTRICT OF COLUMBIA, TWENTY-THREE STATES, AND THE U.S. VIRGIN ISLANDS IN SUPPORT OF THE PETITIONERS

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No. 01-1231

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BRIEF OF *AMICI CURIAE*, THE DISTRICT OF COLUMBIA, TWENY-THREE STATES, AND THE U.S. VIRGIN ISLANDS IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICI CURIAE*

This brief is submitted by the District of Columbia, twenty-three states, and the U.S. Virgin Islands.[1] The brief is submitted in support of the petition for writ of certiorari filed by the Connecticut Department of Public Safety, seeking reversal of *Doe v. Department of Public Safety*, 271 F.3d 38 (2d Cir. 2001). In that decision, the Second Circuit held that

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[1] The states who appear as *amici curiae* are: Alabama, Alaska, California, Colorado, Delaware, Florida, Hawaii, Indiana, Kansas, Maryland, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, and Utah.

Connecticut's sex offender registration and notification law is unconstitutional on the ground that it violates the procedural component of the Due Process Clause of the Fourteenth Amendment. The Second Circuit ruled that Connecticut must give convicted sex offenders residing or working in the State a hearing on whether they are "currently dangerous" and likely to repeat their offenses before the State may notify the public of their convictions.

Connecticut's law was enacted to conform to federal requirements set forth in the 1994 federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act; the 1996 federal Megan's Law; the 1996 Pam Lynchner Act; and the 1998 Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act. 42 U.S.C. § 14071. The Attorney General is directed to establish guidelines for state programs that require persons convicted of crimes against minors or crimes of sexual violence to register and provide their addresses and other information to state or local law enforcement officials and for public notification of the offenders. 42 U.S.C. § 14071(a)(1)(A). A state's failure to enact qualifying legislation could result in a ten percent reduction in the state's share of crime prevention and law enforcement assistance funds under 42 U.S.C. § 3756. 42 U.S.C. § 14071(f).

All states and the District of Columbia have enacted sex offender registration laws to conform to these federal requirements. Connecticut adopted one of two major approaches to comply with federal requirements for sex offender registration, under which the requirements for registration and the extent of community notification are based exclusively on the nature of the offense committed by the offender. The other major approach is like that which the Second Circuit held is constitutionally required and requires an individualized determination of current dangerousness

before a State may publicize a sexual offender's criminal convictions. A number of states and the District of Columbia have enacted registration laws like that of Connecticut. Other states have enacted hybrid statutes, under which the offender's offense alone (generally violent offenses or offenses against children) triggers the requirement of registration and the extent of public notification for more serious offenders, while individualized risk assessments are required for offenders who committed other less serious offenses.

The laws of the states and of the District of Columbia which have provisions similar to those of the State of Connecticut, are subject to similar constitutional challenges.[2] For example, based in part on the lower court decision in this case, *Doe v. Lee*, 132 F.Supp.2d 57 (D.Conn. 2001), the public notification provisions of District of Columbia's sex offender registration act have been held to be unconstitutional and their operation enjoined. *See Doe #1 v. Williams*, 167 F.Supp.2d 45 (D.D.C. 2001), *appeal pending sub nom.*, *John*

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[2] States that employ individualized risk-assessments in their sex offender registration programs also have an interest in this case. If the Second Circuit's decision stands, these states' risk-assessment mechanisms might be made subject to due-process scrutiny even in cases where the risk assessment leads to nothing more than public disclosure of the bare fact of the offender's conviction. Additionally, these states would be frozen into their current systems and could not change to an offense-based or hybrid system as the District of Columbia did just two years ago. Accordingly, the signatories of this brief include several states that employ individualized risk-assessment mechanisms.

Does, 1-5 v. Anthony A. Williams, Nos. 01-7162, 01-5394, 01-7176 (D.C. Cir.).[3]

SUMMARY OF ARGUMENT

This case meets several criteria for a grant of review. The case has exceptional importance. An important law of the State of Connecticut has been held to be unconstitutional on the ground that it violates the procedural component of the Due Process Clause of the Fourteenth Amendment. The Second Circuit has held that the State of Connecticut must give convicted sex offenders residing, working, or attending school in the State a hearing on whether they are "currently dangerous" and likely to repeat their offenses before the State may provide the public with public record information relating to their convictions. The opinions of the lower courts invite similar challenges to the laws of other states, many of which are quite similar in salient respects to that of the State of Connecticut.

The Second Circuit and the district court misapplied *Paul v. Davis,* 424 U.S. 693 (1976), the decision on which they most heavily relied in striking down Connecticut's law. *Paul* dealt with the question of the extent to which a person has a constitutional claim against state or local officials for the release of false and defamatory information about him. These courts expanded *Paul* beyond its limits. The sexual offender notification provisions relate to the release of truthful, public-record information. The Connecticut sex offender registry consists only of information that is already of public record –

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[3] On October 11, 2001, the D.C. Circuit stayed the District Court's injunction in *Doe #1 v. Williams, supra*. The plaintiffs moved for reconsideration and to have the stay vacated after the Second Circuit held Connecticut's statute unconstitutional. On December 4, 2001, the D.C. Circuit denied that motion and the stay remains in effect.

namely criminal trials, required by the Sixth Amendment to be public, in which sex offenders included in the registry have been convicted of a sexual offense or otherwise adjudicated to have committed such an offense.

The Second Circuit did not find falsity in what the State of Connecticut said but in the implication which can be drawn from reporting that an individual has been convicted of rape or some other serious sexual offense. (A. 17-18). The court ruled that the implication to be drawn from a system which reports such past convictions to the public is the statement that the convict is currently dangerous. This implication can be drawn even though the State included in its public notification the statement that it had made "no determination that any individual in the Registry is currently dangerous." (A. 9). It is a serious misreading of *Paul* to find falsity and defamation in the truthful report that a person has previously been convicted of a serious sexual offense. *Paul* does not require a State to give a convict a hearing on whether he is "currently dangerous" before the public-record fact of a serious criminal conviction can be reported.

Indeed, that conclusion also necessarily follows from *Paul's* holding that there is no substantive right to prevent a state or local government from reporting the fact of an arrest. The Court rejected an argument in which the plaintiff argued that "the State may not publicize a record of an arrest," basing his argument on a "right of privacy" guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments. 424 U.S. at 712-714. The Court stated that "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." This reasoning applies with much stronger force where, as here, the fact of a conviction, rather than a mere arrest, is publicized.

In short, this case is important, because many states have laws similar to the Connecticut statute struck down by the

Second Circuit. That court's decision is based on a serious misreading of *Paul v. Davis* and conflicts with that decision. Additionally, as demonstrated by the Petition, and acknowledged by the Second Circuit, there is a direct and irreconcilable conflict among circuits on the issue presented here. (Pet. at ; A. 32-33).[4] Review should be granted.

REASONS FOR GRANTING THE PETITION

I. THIS CASE HAS EXCEPTIONAL IMPORTANCE TO MANY STATES WITH SIMILAR SEX OFFENDER REGISTRATION LAWS.

All states and the District of Columbia have sex offender registration laws which conform to the requirements of the federal statute and regulations or guidelines to protect children and adults from known child molesters and known sexually violent offenders. The first federal statute to be enacted, as part of the 1994 federal crime bill, is the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.[5] 42 U.S.C. § 14071. In 1996, the

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[4] Although the Court has granted the petition for writ of certiorari to the Ninth Circuit in *Doe v. Ott*, ___ U.S. ___, 122 S.Ct. 1062 (2002), it is important for the Court to grant Connecticut's petition for a writ of certiorari to the Second Circuit as well. This case involves a due process challenge to sex offender registration laws. Since the lower court decision in either case would hobble the ability of states to inform communities about convicted sex offenders in their midst, the Court should resolve both issues.

[5] The law was named for eleven-year-old Jacob Wetterling who was abducted at gunpoint by a masked man as he was returning home from a convenience store in St. Joseph, Minnesota, in 1989 and was never found. H.R. Rep. No. 392, 103d Con., 1st Sess. 3 (1993).

law was amended by the federal Megan's Law to require community notification when necessary to protect the public concerning a specific person required to register.[6] 42 U.S.C. § 14071. The law was amended again in 1996 by the Pam Lychner Sexual Offender Tracking and Identification Act. Among other things, this amendment directs the Federal Bureau of Investigation to establish a national database of sex offenders to assist law enforcement agencies in tracking sex offenders when they move from one state to another. 42 U.S.C. § 14072.

The law requires the Attorney General to establish guidelines for state programs to require persons convicted of crimes against minors or crimes of sexual violence to register and provide their addresses and other information to state or local law enforcement officials. 42 U.S.C. § 14071(a)(1)(A).[7] A state's failure to enact qualifying

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[6] The law was named for seven-year-old Megan Kanka, who was was raped and murdered by a neighbor in 1994. The neighbor enticed Megan into his home with an invitation to see his puppy and then raped and killed her. Megan's body was found several days later in a plastic bag in a nearby wooded area. The neighbor had previously been convicted twice of child molestation and moved into the house across from the Megan's upon his release from prison; he lived there with two other convicted sex offenders. Neither Megan's parents nor other neighbors knew anything about his history or that of the other occupants of the house. *See E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997).

[7] In the event a state fails to establish a qualifying sexual offender registration system, sexual offenders in that state are required to register with the Federal Bureau of Investigation,

legislation could result in a ten percent reduction in the state's share of crime prevention and law enforcement assistance funds under 42 U.S.C. § 3756, known as the Edward Bryne Act. *See* 42 U.S.C. § 14071(f).

The law requires that state programs must include in their registries persons convicted of enumerated sexual and other criminal offenses against a minor, sexually violent offenses, and what the law defines as a "sexually violent predator." 42 U.S.C. § 14071(a)(1). The term "criminal offense against a victim who is a minor" includes kidnapping or false imprisonment of a minor, except by a parent; criminal sexual conduct toward a minor; solicitation of a minor to engage in sexual conduct or to practice prostitution; use of a minor in a sexual performance; or any criminal conduct that is a sexual offense against a minor; and attempts to commit any of these offenses. 42 U.S.C. § 14071(a)(3)(A).

A "sexually violent offense" is an offense which is comparable to "aggravated sexual abuse" or "sexual abuse" described in 18 U.S.C. §§ 2241 and 2241 or attempts to commit these offenses. 42 U.S.C. § 14071(a)(3)(B). "Aggravated sexual abuse" is an offense under which a person "knowingly causes another person to engage in a sexual act" by force or by threat or placing that person in fear of "death, serious bodily injury, or kidnapping;" engages in a sexual act after rendering the victim unconscious or by administering a drug or intoxicant that substantially impairs the ability of that person to appraise or control conduct. 18 U.S.C. § 2241. Aggravated sexual abuse is also defined as a sexual act with a child under 12 years of age or under 16 years of age if the perpetrator is four years older than the victim. *Id.* Sexual abuse is engaging in a sexual act by placing the person in fear

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which is required to establish a federal system. 42 U.S.C. § 14072(c).

other than fear of death, serious bodily injury, or kidnapping or engaging in a sexual act with a person "incapable of appraising the nature of the conduct" or "physically incapable" of declining participation or communicating unwillingness to engage in the sex act. 18 U.S.C. § 2242. A "sexually violent predator" is a person who has been convicted of a sexually violent offense and has a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses. 42 U.S.C. § 14071(a)(3)(C).

The registration period is for life or for a minimum period of ten years. 42 U.S.C. § 14071(b)(6)(A) & (B). A person must register for life if (1) he has committed more than one registration offense; (2) he has committed an "aggravated" offense, like those described in 18 U.S.C. § 2241, or (3) he is a "sexually violent predator." 42 U.S.C. § 14071(b)(6)(B). Those convicted of other registration offenses must register for a period of 10 years. 42 U.S.C. § 14071(b)(6)(A). The states must collect specific information from registrants, including home and work addresses, fingerprints and a photograph. 42 U.S.C. § 14071(b)(1). Registrants must report changes of address, and state officials are required to verify information as to registrants at least annually. 42 U.S.C. § 14071(b)(1)&(3). States are required to obtain additional information from sexually violent predators, including identifying factors, anticipated future residence, offense history and any treatment received for mental abnormality or personality disorder and must verify information every 90 days. *Id.*

The statute permits states to release information collected under their registration programs "for any purpose permitted under the laws of the State." 42 U.S.C. § 14071(e)(1). The guidelines mention the broad discretion that states have to release information, stating that "there is no requirement under the Act that registration information be treated as private or

confidential to any greater degree than the state may wish." 62 Fed.Reg. 581 (Jan. 5, 1999). A state is required to release information to the community "that is necessary to protect the public concerning a specific person required to register under" the federal law. 42 U.S.C. § 14071(e)(2).[8]

Connecticut, other states including the States of Alaska, Colorado, Kansas, Missouri, Oklahoma, Oregon, South Carolina, South Dakota, and Utah, and the District of

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[8] The Department of Justice Guidelines suggest any one of three different approaches for community notification:

> One type of approach … involves particularized risk assessments of registered offenders, with differing degrees of information release based on the degree of risk. …
>
> States also are free under the Act to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories. …
>
> Another approach by which states can comply with the Act is to make information accessible to members of the public on request. This may be done, for example, by making registration lists open for inspection by the public, or by establishing procedures to provide information concerning the registration status of identified individuals in response to requests by members of the public. …

64 Fed. Reg. 582.

Columbia have all based community notification primarily on the nature of the offense committed by the offender rather than other characteristics of the offender or the use of individualized risk factors.[9] This type of notification flows from the Wetterling Act, because that is the approach Congress took in enacting the law. Except in dealing with sexually violent predators, the Wetterling Act is geared only to the nature of the offense committed by the offender.[10] It is undoubtedly the reason that Connecticut and other states have chosen this means for community notification. It is the reason that this case has great importance to other states, as well as the State of Connecticut.

I. THE COURT OF APPEALS DECISION CONFLICTS WITH *PAUL v. DAVIS.*

A. *Paul* Does Not Require a Hearing on Whether an Offender Is Currently Dangerous Before Release of Public Record Information of His Convictions.

The petition involves whether the federal courts may enjoin the State of Connecticut from disseminating truthful conviction information to the public from public records —

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[9] One authority has indicated that 19 states require that all offenders convicted of specified sex offenses undergo public notification without individualized risk assessments. Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 608 (2000).

[10] Counsel for petitioners informed us that the Department of Justice granted the State of Connecticut a waiver of the requirement that it include the category of "sexually violent predator" in its registration system.

judicial records — about the sex offenses committed by sex offenders living, working, or attending school in the State. The collection and dissemination of that information is done pursuant to a State law, whose provisions conform to the requirements of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act and Megan's Law, as amended, 42 U.S.C. § 14071. The Second Circuit held that conviction information can only be released to the public if the State first makes a determination that the sex offenders are currently dangerous in the sense that they are likely to repeat their offenses.

This decision is inconsistent with the Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976). There, the Court held that the practice of a city police force of disseminating information regarding suspected shoplifters did not violate either substantive privacy interests or the procedural component of the Due Process Clause of the Fourteenth Amendment. *Paul* involved an "Active Shoplifters" offender list which was very similar in salient respects to the sex offender registry involved in this case. It had been maintained by the police department of the City of Louisville, Kentucky for fifteen years.[11] The principal difference is that only a conviction will suffice to place a sex offender on Connecticut's offender registry, while a mere arrest was sufficient in *Paul*. Indeed, the plaintiff in that case had been put on the active shoplifter list based on an arrest; the charges against him were dismissed after the list had been disseminated to 180 merchants.

The "Active Shoplifters" list had a cover memorandum and five pages of names with the pictures of those who had

---

[11] *See Davis v. Paul*, 505 F.2d 1180, 1181 n. 1 (6th Cir. 1974), *rev'd*, 424 U.S. 701 (1976).

been determined to be shoplifters. The memorandum provided:

> TO: BUSINESSMEN IN THE METROPOLITAN AREA
>
> The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in the criminal field.
>
> This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.
>
> Only the photograph and name of the subject is shown on this flyer, if additional information is desired, please forward a request in writing .... [424 U.S. at 695]

The flyer had an additional five pages of "mug shot" photos alphabetically arranged, and each page was headed:

> NOVEMBER 1972
> CITY OF LOUISVILLE
> JEFFERSON COUNTY
> POLICE DEPARTMENTS
> ACTIVE SHOPLIFTERS

Id. The plaintiff's name and mug shot appeared on the second page. *Id.*

In *Paul*, this Court recognized a constitutional tort similar to defamation where a defamatory statement by government officials results in stigma-plus. Specifically, a plaintiff must demonstrate each of the following elements for the constitutional tort the Court recognized: (1) a defamatory statement which defames the plaintiff; (2) a serious harm to

the plaintiff's reputation; and (3) a significant alteration or extinguishment of a right or status previously recognized by state law. 424 U.S. at 708, 710-12. These elements of the cause of action are not met here.

There is no defamatory statement. In order to establish the first element of the *Paul* cause of action, a plaintiff must demonstrate that the statement made by government officials was false. Falsity is an element of every cause of action for defamation the Court has permitted to go forward under the First Amendment. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 386-89 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Under its sex offender law, the State has disseminated the true, public fact that offenders included in the registry were convicted or found not guilty by reason of insanity of designated sex offenses. Before anyone on the registry was convicted or found not guilty by reason of insanity of that sex offense, he had the extensive procedural protections afforded by the criminal justice system. At the end of that process, that person was adjudicated to be a "sex offender." The State of Connecticut does nothing more than disseminate this adjudicated fact to the public. That is all of the process contemplated by *Paul*.

The lower court did not find that the registry contained any false statement. Instead, it ruled the public dissemination of registry information implies that sexual offenders on the registry are currently dangerous. The finding of an implicit assertion of dangerousness is directly contrary to explicit statements which accompany the registry that the State "has not considered or assessed the specific risk of reoffense with regard to any individual" registrant and that it "has made no determination that any individual in the Registry is currently dangerous."

The Second Circuit's decision to strike down the law is based on the apparent assumption that the general public does not understand such statements and cannot evaluate public record information. That assumption is contrary to the usual assumption in our jurisprudence that the public is fully capable of evaluating truthful information and that information from public records is in the public domain and can be disseminated without editorial comment from the government. *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. 469, 492-97 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 386-88 (1967).

II. The Second Circuit Imposed a Substantive Limitation on the Publication of Conviction Records in Violation of *Paul*.

The Second Circuit imposed a substantive limitation on the release of conviction records even though it rested its holding in procedural due process grounds. This contradicts the square holding in *Paul*.

The ruling that the State of Connecticut makes an implicit statement that a sex offender is currently dangerous when it releases the offender's conviction record and, therefore, cannot release that information without first affording an offender a hearing on the question of current dangerousness is a substantive limitation on the public dissemination of a sex offender's criminal history. That is so, because the State expressly stated that it had made no determination that any individual in the registry is currently dangerous.[12] Thus, the

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[12] The statement that the State of Connecticut makes with the release of record information is:

> The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to

implicit statement that the Second Circuit found the State to have made is directly contrary to the State's explicit statement that accompanied release of the information. The implicit statement accompanies the publication of the fact of conviction as a matter of law, regardless of what the State explicitly says.

This prohibits or limits the release of sex offender convictions unless a risk assessment which concludes that a person poses a danger is made first, at least if the offender requests such an assessment. This showing approaches and may even exceed that necessary for the civil commitment of a sexual predator. *Kansas v. Crane*, 122 S.Ct. 867, 870 (2002) (To civilly commit, "there must be proof of serious difficulty in controlling behavior."). The State of Connecticut was not attempting to civilly commit sex offenders here; it was merely publishing public record information relating to their convictions. There is a big difference.

Such a difference is recognized in the cases. In *Paul*, the plaintiff-respondent argued that "the State may not publicize a record of an arrest" where the charges against him had been dismissed, basing his argument on a "right of privacy" guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments. 424 U.S. at 712-714. The Court responded that "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." This reasoning applies with much stronger force where, as here, the fact of a conviction, rather than a mere arrest that did not result in a conviction, is publicized.

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his or her inclusion within this registry and has made no determination that any individual in the Registry is currently dangerous. (A. 9).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975),[13] the Court held that a state may not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records which are maintained in connection with a pubic prosecution and which themselves are open to public inspection." *Id.* at 491. Thus, the rape victim could not be protected from having her name published when her name was taken from public records and court proceedings, in contravention of local statutes.

The practical effect of the decision below is to prohibit the dissemination of the name of the rapist where the dissemination is required by local law. This result is wrong and should not stand. The "good" name and reputation of the rapist cannot receive constitutional protection where similar protections are denied his victim.

The Court based the decision in *Cox Broadcasting* on the fact that the information published was truthful and that it was

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[13] In *Cox*, a broadcast reporter covered a criminal trial in Georgia in which the defendant was convicted of raping and murdering his victim. The reporter uncovered the name of the victim from court records, including the indictment. He broadcast the victim's name in violation of a Georgia statute, which made it a misdemeanor to broadcast or otherwise report "the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made." The victim's family obtained a civil, tort recovery based on a private action under the statute. The Supreme Court of Georgia held that the statute did not violate the First Amendment. 420 U.S. at 470-76. This Court reversed, holding that "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.* at 496.

already in the public domain on official court records. The Court stated:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby served. Public records by their very nature are of interest to those concerned with the administration of government .... In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official records open to public inspection.

420 U.S. at 493. The Court also noted that special protection is given to reports of judicial proceedings. *Id.* at 492-93, citing *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in a court room is public property.").

Under its sex offender statute, the State of Connecticut merely disseminates the true, public fact that a person was convicted or found not guilty by reason of insanity of a designated sex offense. Before that person was convicted or found not guilty by reason of insanity of that sex offense, he had the extensive procedural protections afforded by our criminal justice system. At the end of that process, that person was adjudicated to be a "sex offender." The statute does nothing more than disseminate this adjudicated fact to the public.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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April 15, 2002

No. 01-1231

JUL 19 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER,

Petitioners,

v.

SAMUEL POE,
JOHN DOE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

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Petition For Certiorari Filed February 19, 2002
Certiorari Granted May 20, 2002

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U.S. DISTRICT COURT
DISTRICT OF CONNECTICUT (New Haven)

CIVIL DOCKET FOR CASE: #99-CV-314

Filed: 02/22/99

Doe, et al. v. Public Safety, et al.
Assigned to: Judge Robert N. Chatigny
Demand: $0,000 Nature of Suit: 950
Lead Docket: None Jurisdiction: Federal Question
Dkt # in other court: None

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5/18/01	–	MINUTE Entry: denying motion to stay, mooting motion to Modify, granting motion to Certify Class – written ruling will follow, and granting motion for Permanent Injunction in Favor of Due Process
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5/18/01	–	ENDORSEMENT: The motion for permanent injunctive relief was granted during the telephone conference held today and the injunction has been entered by separate order. The motion for preliminary injunctive relief as to the class is therefore denied as moot. The motion for declaratory judgment on behalf of the class is granted
5/18/01	82	MEMORANDUM OPINION re: motion to Certify Class
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5/18/01	84	JUDGMENT for John Doe on the due process claim and in favor of Dept. of Public Safety, Office of Adult Probation, John Armstrong on the ex post facto claim.

RELEVANT DOCKET ENTRIES

SECOND CIRCUIT COURT OF APPEALS
CASE NO. 01-7561

5/18/01	APPELLANTS Dept. of Public Safety, Office of Adult Probation, John Armstrong, motion for stay of Injunction on appeal
5/18/01	APPELLEES John Doe, Samuel Poe memorandum in opposition to motion for stay
5/18/01	COPY of district court order dated 5/18/01 endorsed by Hon. Robert N. Chatigny RECEIVED.
5/24/01	COPY of notice of appeal and district court docket entries on behalf of Appellants Dept. of Public Safety, Office of Adult Probation, John Armstrong filed.
5/24/01	COPY of district court order dated 5/18/01 endorsed by Hon. Robert N. Chatigny, USDJ RECEIVED.
5/29/01	COPY of district court order dated 3/31/01 endorsed by Hon. Robert N. Chatigny, USDJ, RECEIVED.
5/29/01	COPY of district court order dated 5/17/01 endorsed by Hon. Robert N. Chatigny, USDJ, RECEIVED.
5/29/01	COPY of district court order dated 5/18/01 endorsed by Hon. Robert N. Chatigny, USDJ, RECEIVED.

6/4/01	COPY of notice of appeal and district court docket entries on behalf of Appellee-Cross-Appellant John Doe in 01-7600 filed.
6/5/01	ORDER FILED DENYING motion for stay [1855895-1] by Appellant Dept. of Public Safety, Office of Adult Probation, John Armstrong, endorsed on motion dated 5/18/01. "IT IS HEREBY ORDERED that the motion for stay pending appeal be DENIED." The Hon. Chester J. Straub, C.J., dissents. IT IS FURTHER ORDERED that the appeal shall be expedited.
6/7/01	COPY of district court order dated 3/31/01 endorsed by Hon. Robert N. Chatigny RECEIVED.
6/7/01	COPY of district court order dated 4/9/01 endorsed by Robert N. Chatigny, USDJ, RECEIVED.
6/7/01	COPY of district court order dated 5/18/01 endorsed by Linda I. Kunosky, Deputy Clerk RECEIVED.
6/18/01	APPELLANT-APPELLEES Dept. of Public Safety, Office of Adult Probation, John Armstrong in 01-7561 brief RECEIVED.
6/19/01	APPELLANT-CROSS-APPELLEE Dept. of Public Safety in 01-7561, Appellant-Cross-Appellee Office of Adult Probation in 01-7561, Appellant-Cross-Appellee John Armstrong in 01-7561 brief FILED with proof of service.
7/5/01	RECORD on appeal index in lieu of record filed.

7/6/01	APPELLEE-CROSS-APPELLANT John Doe in 01-7561 reply brief filed with proof of service.
7/12/01	CASE heard before CABRANES, POOLER, SACK C.JJ.
10/19/01	JUDGMENT of the district court is AFFIRMED by published signed opinion filed.
10/19/01	JUDGMENT filed.
11/13/01	JUDGMENT MANDATE ISSUED. (cv72) [01-7561]
11/28/01	COPY of district court order dated 11/14/01 RECEIVED.
12/13/01	COPY of district court order dated 12/10/01 from Robert N. Chatigny USDJ RECEIVED.
3/4/02	NOTICE of filing petition for writ of certiorari for Appellant-Cross-Appellee Dept. of Public Safety in 01-7561 dated 2/27/02 filed.
5/24/02	LETTER dated 5/20/02 from the Supreme Court advising of order GRANTING petition for writ of certiorari by Appellant-Cross-Appellee Dept. of Public Safety.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, on behalf of himself and all others similarly situated, et al., Plaintiffs, v. DR. HENRY C. LEE, in his official capacity as Commissioner of Public Safety; et al., Defendants.	CIVIL NO. 3:99CV00314(RNC) JULY 9, 1999

LOCAL RULE 9(C)1 STATEMENT

This statement sets forth the undisputed facts that may be relevant to the issues to be decided in the parties' motions for summary judgment. The exhibits referred to herein are filed as a separate appendix. Pursuant to the Scheduling Order entered in this case, it is expected that the parties will also file a Joint Stipulation of Undisputed Facts that will include most of the undisputed facts set forth herein as well as some supplemental information.

I. PARTIES.

A. Plaintiff.

1. Plaintiff John Doe is a resident of the State of Connecticut who has been convicted of an offense that requires registration pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* John Doe is a pseudonym that is being used in

this case to protect the true identity of the plaintiff from public disclosure.

B. Defendants.

2. Defendant Dr. Henry C. Lee is and has been the Commissioner of Public Safety since approximately June 1998. Defendant Lee is sued in his official capacity.

3. As Commissioner of Public Safety, defendant Lee has certain responsibilities in connection with Public Act 98-111, as amended by Public Act 99-183. Those responsibilities are set forth in Conn. Gen. Stat. §§ 54-250 *et seq*.

4. Defendant William Carbone is and has been the Executive Director of the Court Support Services Division of the Judicial Department since September 25, 1998. Since April 2, 1999, defendant Carbone has held the position of Director of the Office of Adult Probation. As Director of the Office of Adult Probation, defendant Carbone's responsibilities are set forth in Conn. Gen. Stat. § 54-105. Defendant Carbone is sued in his official capacity.

5. Defendant John Armstrong is and has been the Commissioner of Correction since approximately January 1995. Defendant Armstrong is sued in his official capacity.

6. As Commissioner of Correction, defendant Armstrong's responsibilities are set forth in Conn. Gen. Stat. § 18-81.

7. As Commissioner of Correction, defendant Armstrong also has certain responsibilities in connection with registration of persons pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*. and 54-102g.

II. REGISTRATION REQUIREMENTS.

A. Registration of Sex Offenders.

8. The Department of Public Safety has in place the following policies and/or procedures pertaining to the registration of individuals pursuant to Public Act 98-111:

a. Registration Requirement Letter;

b. Change of Address Procedures;

c. Connecticut Convictions Residing Out of State;

d. Death Notification Procedures;

e. DNA Databank Evidence Collection Protocol;

f. Fingerprints;

g. Image Process;

h. Office of Field Operations Orders/Memos;

i. Out of State Convictions, Residing in Connecticut;

j. Registration Instructions;

k. Registration Requirements; and

l. Process for Return of Registration Information.

Copies of the Department of Public Safety policies are provided as Ex. A. In the event that the Department of Public Safety replaces or modifies any of these policies and/or procedures to comply with Public Act 99-183, copies will be provided to the Court in a supplemental filing.

9. The Department of Public Safety does not conduct any assessment as to whether or not an individual poses

any threat to the safety of the community in order to determine whether or not that person is required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*.

10. Consistent with Conn. Gen. Stat. § 54-1421, the Department of Public Safety has a procedure in place to respond to challenges to the accuracy or completeness of conviction records of persons believed to be subject to the registration requirements pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*. Other than that, the Department of Public Safety does not have statutory authority to exercise any discretion in determining whether individuals must register or whether they may be excused from registering pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*.

11. The Department of Correction has required and continues to require some of the persons subject to its supervision to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*. and 54-102g.

12. The Department of Correction has in place the following policies and/or procedures pertaining to the identification and/or registration of individuals pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*. and 54-102g:

a. Department of Correction Administrative Directive 9.3 (effective date June 1, 1998);

b. Memorandum to All Agency Employees from John J. Armstrong, Commissioner regarding Exception to Administrative Directive 9.3, Admissions, Transfers and Discharge, dated September 21, 1998;

c. Sex Offender Registration (revised September 30, 1998);

d. Memorandum to Facility Contact Persons, Sex Offender Registration Procedures from Fred Levesque, Director, Offender Classification & Population Management regarding Sex Offender Registration Forms, dated September 24, 1998;

e. Memorandum to All Wardens from Fred Levesque, Director, Offender Classification & Population Management regarding Notification to Probation, dated September 28, 1998;

f. Memorandum to Facility Contact Persons, Sex Offender Registration Procedures from Fred Levesque, Director, Offender Classification & Population Management regarding Revised Sex Offender Registration Procedures, dated October 7, 1998;

g. Memorandum to Records Specialists from Fred Levesque, Director, Offender Classification & Population Management regarding Public Act 98-111, An Act Concerning the Registration of Sex Offenders, dated October 1, 1998;

h. Memorandum to All Wardens from Fred Levesque, Director, Offender Classification & Population Management regarding Sex Offender Registration Procedures, dated November 4, 1998;

i. Memorandum to All Wardens from Fred Levesque, Director, Offender Classification & Population Management regarding Sex Offender Registration Audits/Procedures, dated November 24, 1999;

j. Memorandum to Wardens from Fred Levesque, Director, Offender Classification &

Population Management regarding Repealed Statutes – Sexual Offenses, dated February 23, 1999; and

k. Sex Offender Registration Procedures for Current Inmates Convicted Prior to 10/1/1998, undated.

Copies of the Department of Correction policies and/or procedures are provided as Ex. B. In the event that the Department of Correction replaces or modifies any of these policies and/or procedures to comply with Public Act 99-183, copies will be provided to the court in a supplemental filing.

13. The Department of Correction does not conduct any assessment as to whether or not an individual poses any threat to the safety of the community in order to determine whether or not that person is required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq*.

14. The Office of Adult Probation has in place the following policy and/or procedure pertaining to the registration of and/or community notification regarding individuals required to register pursuant to Public Act 98-111:

a. Connecticut Office of Adult Probation, Sex Offender Notification Policy, dated October 20, 1998.

A copy of the Office of Adult Probation policy and/or procedure is provided as Ex. C. In the event that the Office of Adult Probation replaces or modifies this policy and/or procedure to comply with Public Act 99-183, copies will be provided to the Court in a supplemental filing.

15. The Office of Adult Probation does not conduct any assessment of persons subject to its supervision

regarding any threat an individual poses to the safety of the community in order to determine whether or not a person is subject to the registration requirements of Con. Gen. Stat. §§ 250 *et seq*.

III. PUBLIC DISSEMINATION OF INFORMATION.

16. As of the date of this Statement, a direct link to the Department of Public Safety Sex Offender Registry is provided in the "Where Can I Find . . . " section of the "Frequently Asked Questions" section of the official website for the State of Connecticut. Copies of the pages providing these links are provided as Ex. E.

17. The Department of Public Safety Sex Offender Registry website consists of a direct link to search the database for all persons thereon registered pursuant to Public Act 98-111 as well as text providing certain information concerning the website and other direct links. The text section of the Department of Public Safety Sex Offender Registry website also includes a direct link to an e-mail address of the Department of Public Safety Sex Offender Registry Unit.

18. The database can be searched by last name, the first letter of a last name, town name or zip code. Searching the database by the first letter of a last name provides the names of all registrants whose last name begins with the selected letter. Searching the database by any town name or zip code provides the names of all registrants living in that town or zip code.

19. The listing of the name of the registrant provides a direct link to a page entitled "Registered Sex Offender."

If the registrant has complied with the registration requirement and there have been no technical difficulties and the Department of Public Safety has had time to post the information, this page contains the name, current residence address as provided by the registrant, a photograph, and physical description.

20. Exhibit F provides a true and complete copy of the text of the Department of Public Safety Sex Offender Registry website prior to late March 1999.

21. Exhibit G provides a true and complete copy of the text of the Department of Public Safety Sex Offender Registry website beginning in approximately April 1999.

22. Individual sex offender listings on the Department of Public Safety Sex Offender Registry website were accessed approximately 3,045,465 times between January 1, 1999 and May 30, 1999. The number of times individual sex offender listings were accessed per month during this period was approximately as follows:

January 1999	1,937,340
February 1999	383,701
March 1999	356,879
April 1999	191,248
May 1999	176,297

23. The Department of Public Safety Sex Offender Registry Unit received a total approximately 92 e-mail messages from members of the public during the month of April, 1999, approximately 76 e-mail messages from members of the public during the month of May, 1999, and approximately 40 e-mail messages from members of the public during the month of June, 1999.

24. Exhibit H provides true and complete copies of website home pages for local television stations that provide direct links to the Department of Public Safety Sex Offender Registry website.

IV. COMMUNITY NOTIFICATION REGARDING SEX OFFENDERS.

25. The Department of Public Safety has in place the following policy and/or procedure pertaining to the public dissemination of information concerning persons registered pursuant to Public Act 98-111:

a. Memorandum to OFO Commanders from Lieutenant Colonel Timothy F. Barry, dated November 16, 1998.

A copy of this policy is provided as Ex. D. In the event that the Department of Public Safety replaces or modifies this policy and/or procedure to comply with Public Act 99-183, copies will be provided to the Court in a supplemental filing.

26. The Department of Public Safety does not have a procedure to permit registrants to contest the necessity of notification to protect the public or any individual in any jurisdiction from the registrant.

27. The Office of Adult Probation has the following policy in place regarding notification of members of the community regarding a person under the supervision of the Office of Adult Probation who has been convicted of a sexual offense: "Residents and/or members of the community will be provided information about sex offenders under those circumstances when it is believed that such notification is necessary to prevent a person from being

victimized by the sex offender." A copy of this policy is provided as Ex. C.

28. Other than a court hearing dealing with the issue of notification by the Office of Adult Probation of members of the community with regard to an individual under the supervision of the Office of Adult Probation, there is no formal procedure afforded by the Office of Adult Probation for contesting the necessity of notification to members of the community regarding a person convicted of a sexual offense with whom they may have contact.

V. PUBLIC STATEMENTS REGARDING PERSONS REQUIRED TO REGISTER AS SEX OFFENDERS.

29. The following exhibits accurately reflect statements made in television broadcasts regarding "Megan's Law" or persons designated as "sex offenders."

Ex. I-1 *Tougher Megan's Law Approved* (WTNH television broadcast, May 2, 1998).

Ex. I-2 *Governor Signs Several Bills Into Law* (WTNH television broadcast, Aug. 10, 1998).

Ex. I-3 *Changes Coming to Megan's Law* (WTNH television broadcast, Sept. 30, 1998).

Ex. I-4 *Halloween Safety* (WTNH television broadcast, Oct. 30, 1998).

Ex. I-5 *State Ready to Put Sex Offender Registry on Internet* (WTNH television broadcast, Dec. 29, 1998).

Ex. I-6 *"Megan's Law" list hits the Web* (WVIT/MSNBC television broadcast, Jan. 1, 1999).

Ex. I-7 *Cops Meet to Discuss Missing Persons in Sex Offender Database* (WTNH television broadcast, Feb. 10, 1999).

Ex. I-8 *Megan's Law has real estate agents wondering what they have to disclose* (WTNH television broadcast, May 1, 1999).

Ex. I-9 *Senate gives final approval to Megan's Law bill* (WTNH television broadcast, June 7, 1999).

Ex. I-10 *Text of Gov. John G. Rowland's speech marking the end of the 1999 legislative session* (WTNH television broadcast, June 9, 1999).

30. The following exhibits are accurate copies of articles that have appeared in the press regarding "Megan's Law" or persons designated as "sex offenders."

Ex. J-1 *Family Sees Sex-Offender Bill Signed; "Megan's Law" A Reality*, Hartford Courant, May 31, 1995.

Ex. J-2 *Bill Targets Suspected Abductors*, Hartford Courant, March 1, 1996.

Ex. J-3 *30 Discuss Megan's Law*, Register Citizen, September 24, 1997.

Ex. J-4 *Confusion Causes Varied Access to Data on Sex Offenders*, Hartford Courant, October 10, 1997.

Ex. J-5 *"Megan's Law" and Questions Of Liability*, New York Times, December 14, 1997.

Ex. J-6 *Rallying for Tougher Megan's Law*, Hartford Courant, September 19, 1998.

Ex. J-7 *Publicizing Sex Offenders, State Legislator to Present TV Profiles*, Hartford Courant, October 13, 1998.

Ex. J-8 *Unmasking Sex Offenders*, Bristol Press, October 13, 1998.

Ex. J-9 *Officer Stresses Parent Awareness, Wants Less Focus on Molester Lists*, Hartford Courant, October 17, 1998.

Ex. J-10 *A Contest Focusing on Conduct, Secretary of the State Candidates Assail One Another*, Hartford Courant, October 28, 1998.

Ex. J-11 *Kids' Safety A Key Issue, Widlitz Defends Megan's Law Vote Puffer Has Decried*, Hartford Courant, October 29, 1998.

Ex. J-12 *Sex Offender List Available to All Parents*, Waterbury Republican-American, December 10, 1998.

Ex. J-13 *"Megan's Law": More Harm Than Good?*, Connecticut Law Tribune, December 21, 1998.

Ex. J-14 *Sex Offenders' Names To Be On Internet*, Hartford Courant, December 30, 1998.

Ex. J-15 *Sex offender registration goes online*, New Haven Register, December 30, 1998.

Ex. J-16 *Web Site Lists Sex Offenders; Debate Ensues*, Hartford Courant, January 2, 1999.

Ex. J-17 *Megan's Law Unfair*, Connecticut Law Tribune, January 11, 1999.

Ex. J-18 *Changes Needed In Megan's Law*, Hartford Courant, January 24, 1999.

Ex. J-19 *Many missing from Megan's Law registry*, Journal Inquirer, February 17, 1999.

Ex. J-20 *Megan's Law Effort Opposed*, Hartford Courant, April 14, 1999.

Ex. J-21 *Does Megan's Law need a reality check?*, Waterbury Republican-American, May 2, 1999.

Ex. J-22 *Forum to Explain Details of Megan's Law*, Hartford Courant, May 25, 1999.

Ex. J-23 *House Backs Expanding Megan's Law To Cover More Crimes*, Hartford Courant, June 2, 1999.

31. The following exhibits accurately reflect public statements made by members of the Connecticut General Assembly prior to passage of Public Act 98-111.

Ex. K *Senate Debate on Senate Bill 65, An Act Concerning the Registration of Sexual Offenders* (Apr. 28, 1998).

Ex. L *House of Representatives Debate on Senate Bill 65, An Act Concerning the Registration of Sexual Offenders* (May 2, 1998).

32. The following exhibits accurately reflect public statements made by members of the Connecticut General Assembly prior to passage of Public Act 99-183.

Ex. M *House of Representatives Debate on House Bill 6785, An Act Concerning the Registration of Sexual Offenders* (June 1, 1999).

Ex. N *Senate Debate on House Bill 6785, An Act Concerning the Registration of Sexual Offenders* (June 7, 1999).

Respectfully submitted,

BY: /s/ Ann M. Parrent
Ann M. Parrent
Fed. Bar No. ct16077
Jody L. Yetzer
Fed. Bar No. ct 18999
Connecticut Civil Liberties Union Foundation
32 Grand Street
Hartford, CT 06106
(860) 247-9823

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been mailed postage prepaid to Margaret Q. Chapple, Lynn D. Wittenbrink, Assistant Attorneys General, 110 Sherman Street, Hartford, CT 06105 this 9th day of July 1999.

/s/ Ann M. Parrent
Ann M. Parrent

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, on behalf of himself and all others similarly situated, et al.,	CIVIL NO. 3:99CV00314(RNC)
Plaintiffs,	
v.	JULY 9, 1999
DR. HENRY C. LEE, in his official capacity as Commissioner of Public Safety, et al.,	
Defendants.	

EXHIBITS TO LOCAL RULE 9(C)1 STATEMENT

REGISTRATION REQUIREMENT LETTER

Dear

Records provided to the Connecticut Department of Public Safety indicate that you have been convicted of one or more of the statutes relating to sex offenses which requires you to register as a Sex Offender. You may have previously registered with the Police Department or State Police Troop within the community, which you reside.

Effective October 1, 1998 Connecticut Public Act 98-111 requires you to **re-register** with the Connecticut Department of Public Safety. *Any registration you have previously made will become invalid.* Failure to comply with any or all of the following statutory registration requirements is a Class "D" Felony.

PA 98-111 requires that you:

- Register with the Department of Public Safety after October 1, 1998 at a time and place designated by the department.
- Submit to being fingerprinted
- Submit to being photographed
- Submit to providing a DNA sample if not already provided under 54-102g
- Provide the registry with a current address and notify the registry, in writing within five (5) days, if you should move to a new address. You will also be required to verify your address by mail periodically.

At time of registration a new photo and set of fingerprints will be taken. Additional information relative to

your specific registration requirements will be provided to you.

You are directed to report to the Department of Public Safety upon receipt of this letter within three (3) business days. The location of the registry site is indicated on the back side of this letter. Should you have any questions you may contact the Sex Offender Registry Unit at (860) 685-8060.

Sincerely,

/s/ Sgt. Kathleen A. Miller
Sgt. Kathleen A. Miller
Sex Offender Registry

[LOGO]

STATE OF CONNECTICUT

DEPARTMENT OF CORRECTION
OFFENDER CLASSIFICATION &
POPULATION MANAGEMENT UNIT
1151 East Street South
Suffield, Connecticut 06078

MEMORANDUM

To: Facility Contact Persons
Sex Offender Registration Procedures

From: Fred Levesque, Director
Offender Classification & Population Management

Date: 10/7/98

Subject: Revised Sex Offender Registration Procedure

Enclosed you will find a revised set of the policies for Sex Offender Registration. Please note the revision date on the bottom left corner dated 9/30/98. Please shred the previously issued procedures which were dated 9/18/98.

The following outlines the significant changes to the procedures:

Section 5A, #2, (page 4) indicates when using a two-part (jail file), the Sex Offender Registration checklist is placed on top of Section 1.

Section 6 (page 5), "Incarcerated Offender on Bond Awaiting Execution of Their Sentence" is a new section. Pursuant to the instructions of judicial authorities, the courts may convict an offender and stay the execution of the sentence while the offender is held on bond. The continuance mittimus will specify that a condition of the sentencing is that the offender agrees to provide the Department

of Correction with identifying factors and release to community registration information. The Department of Correction will obtain the identifying factors and complete the release to the community registration forms and forward same to the DPS-Sex Offender Registry. The Department will certify such actions are completed on Attachment I, "Sex Offender Certification Form", which is provided by the court with the continuance mittimus. If the offender refuses to provide the identifying factors or release information, this shall be noted on the certification form and our standard refusal procedures ARE NOT followed.

Section 7 (page 6), "Bond Out and Release from Court Procedures" is a new section. The Department of Correction will provide all pre-trial inmates being released to the community with Attachment H, "Inmate Release Notification Form". This form advises the inmate of the Public Act and that if they have been convicted of one of the identified offenses, in Connecticut or another jurisdiction, they should contact the DPS-Sex Offender Registry. As we anticipate the telephone number for the Registry may change to an 800 number in the future, we have not listed it on Attachment H. You may provide the current telephone number, 1-860-685-8060, to an inmate upon release.

Section 10B, #2 (page 7), indicates attachment G is now called the "Sex Offender Advisement of Registration Requirement Form". (It is the same form which was previously titled "Notice of Release of Sex Offender".) Attachment G is only completed for inmates discharging end of sentence. The change in title is included in all subsequent sections of the procedures.

Section 10B, #3, (page 7), indicates mental health information required on Attachment F, "Sex Offender Registration Form", is provided by the inmate (self-disclosure) and does not require contacting the Mental Health Unit.

Section 10B, #7, (page 8), specifies the inmate's name and number shall be placed on the back of the return receipt bottom corner.

Section 13, "Inmate Notification" (page 9), contains a new procedure. All inmates being released from the Department of Correction to include end of sentence, parole, bond or any other releasing mechanism shall be issued the "Inmate Release Notification Form", Attachment H.

Attachment A, under II, the word "attempt" was added to Criminal (53a-49).

Attachment B, Section II and Section IIIB, references change in title of Attachment G to "Sex Offender Advisement of Registration Requirement Form".

Attachment G, new title, "Sex Offender Advisement of Registration Requirement, Unconditional Release".

Attachment H, new form, "Inmate Release Notification Form".

Attachment I, "Sex Offender Certification Form" (refer to section 6 for procedure)

The Department of Public Safety Instructions for completing the DPS forms were purposely removed from the revised procedure packet.

UPDATES/CLARIFICATIONS

The Department of Public Safety does not want to be notified by the Department of Correction when an individual who had previously registered in the community is returned to a Department of Correction facility. As such, no change of address forms, as noted on Attachment F, have to be completed. If the offender wants to contact the DPS, provide him/her with the address of the DPS-Registry.

If an inmate has questions or claims that he does not meet the requirements for sex offender registration, advise him/her to contact their attorney or Inmates' Legal Assistance. Staff should not try to interpret the public act for the offenders.

Unless an inmate is convicted under 53-021, subsection 2, he/she does not meet the registry requirements. It is not unusual for the court to agree to a conviction for 53-021 without a subsection, even though details of the offense indicate sexual contact. The courts may only convict and sentence to the level specified by the police or the prosecutor in the charging documents.

The letters "M", "V" or "P", only refer to individuals convicted on or after 10/1/98.

ADDITIONAL ATTACHMENTS

1) Updated Facility Contact Person list dated 10/1/98.
2) Health Services Contact Person list dated 10/5/98.
3) Memorandum dated 10/1/98 to Records Specialists from Fred Levesque. It is strongly suggested that you review this memorandum and all relevant procedures with your Records staff.

As indicated previously, if you have any questions contact a member of the Megan's Law Committee. Please provide a copy of this memorandum and attachments to the Back-Up Person and any other relevant staff in your facility.

Thank you for your continued cooperation and assistance in these efforts.

Cc: Deputy Commissioner Tokarz
Deputy Commissioner Matos
Director Coyle, Security
Complex Wardens and Wardens
Records Specialists

TITLE: SEX OFFENDER REGISTRATION

1. **Policy**. The Department of Correction shall ensure that inmates are identified and processed who meet the criteria regarding registration of sex offenders.

2. **Authority and Reference**.

   A. Connecticut General Statutes 53-21(2), 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a, 53a-72b, 53a-73a, 53a-86 (a) (2), 53a-87 (a) (2), 53a-196a, 53a-196b, 53a-8, 53a-48, 53a-49, or if intent to sexually violate or abuse the victim 53a-92, 53a-92a, 53a-94, 53a-94a, 53a-95, 53a-96, 53a-186, 54-97 and 54-102h.

   B. Public Act 98-111.

   C. Administrative Directive 9.3 – Admissions, Transfers and Discharges.

3. **Definitions**. For the purposes stated herein, the following definitions apply:

   Conviction. A judgment entered by a court upon a plea of guilty, a plea of nolo contendere or a finding of guilty by a jury or the court.

   Criminal offense against a victim who is a minor. Means (A) a violation of subsection (2) of section 53-21, subdivision (2) of subsection (a) of section 53a-70, subdivision (1), (4) or (8) of subsection (a) of section 53a-71, subdivision (2) of subsection (a) of section 53a-72a, subparagraph (A) or (D) of subdivision (1) of subsection (a) or subdivision (6) of subsection (a) of section 53a-73a, subdivision (2) of subsection (a) of section 53a-86, subdivision (2) of subsection (a) of section 53a-87, section 53a-196a or 53a-196b, (B) a violation of section 53a-92, 53a-92a, 53a-94, 53a-94a, 53a-95, 53a-96 or 53a-186 of the general statutes, provided the court makes a finding that at the time of the

offense, the victim was under eighteen years of age, or (C) a violation of any of the offenses specified in subparagraph (A) or (B) of this subdivision for which a person is criminally liable under section 53a-8, 53a-49 of the general statutes. For inmates convicted of one of these offenses on or after 10/1/98, a code of "M" or language verifying victim was a minor, will be noted on the mittimus and docketed as such.

DNA (deoxyrihonucleic acid) databank. A registry of identification hereditary characteristics that uses an individual's body fluids or material such as blood.

Facility Contact Person. The Counselor Supervisor/Classification Counselor designated at the facility to coordinate matters related to requirements under Public Act 98-111.

Identifying factors. Current fingerprints, current photographs that absolutely match the inmate, DNA (deoxyribonucleic acid) and a description of any other identifying characteristics as required by the Commissioner of Public Safety. The fingerprint card shall have an inmate name and DOC identification number listed on the card.

Release to the Community. The release of an inmate from the legal custody of the Department of Correction to include release to parole.

RT50 screen for DNA update:

- **DNA eligible Y or N.** If the inmate meets the criteria for a DNA sample, then the answer would be "Y" for yes. If the inmate does not meet the criteria for a DNA sample, then the answer would be "N" for no.
- **DRWN** means drawn. The actual date the sample was drawn by Health Services. This date is on the pink copy of the DNA Databank Submission Form.

- **CONFM** means confirmed. This date reflects the receiving of the DNA Databank Submission form (yellow copy) from the State Police Forensic Science Lab.

Sex Offender. A person convicted of charges identified in Public Act 98-111.

Sex Offender as Imposed by the Court. Those convicted of a felony that is found by the sentencing court to have been committed for sexual purposes. For inmates convicted of one of these offenses on or after 10/1/98, a code of "P" or language verifying the offense was committed for sexual purposes, will be noted on the mittimus and docketed as such.

Sex Offender Registration. A process associated with the Department of Correction that maintains information pertaining to those inmates who meet the criteria in Public Act 98-111.

Sex Offender Registration Checklist. A Department of Correction form that is used as a guide in tracking the Sex Offender Registration processes.

Sex Offender Registration Log Book (DNA). A permanent hardbound volume maintained at each facility with pre-numbered pages used to record the DNA blood draw of sex offenders in sequential order by date, to include inmate name and number, etc. (See sample attached.)

Sex Offender Registration Log Book (Release to Community). A permanent hardbound volume maintained at each facility with pre-numbered pages used to record the community registration of sex offenders in sequential order by date, to include inmate name and number, etc. (See sample attached.)

Sexually violent offense. A violation of section 53a-70, except subdivision (2) of subsection (a) of said section, 53a-70a, 53a-70b, 53a-71, except subdivision

(1), (4) or (8) of subsection (a) of said section, 53a-72a, except subdivision (2) of subsection (a) of said section, 53a-72b or 53a-73a, except subparagraph (A) or (D) of subdivision (1) of subsection (a) of said section, or subdivision (6) of subsection (a) of said section, or of section 53a-92 or 53a-92a of the general statutes, provided the court makes a finding that the offense was committed with intent to sexually violate or abuse the victim, of (B) a violation of any of the offenses specified in subparagraph (A) of this subdivision for which a person is criminally liable under 53a-8, 53a-48, or 53a-49 of the general statutes. For inmates convicted of one of these offenses on or after 10/1/98, a code of "V" or language verifying the offense was a sexually violent offense, will be noted on the mittimus and docketed as such.

4. **Registration of Sex Offenders for DNA Blood Draw.**

   A. **Criteria.** An inmate who is convicted of one or more of the following:

      1. Criminal Offense Against a Minor – refer to Attachment A.

      2. Sexually Violent Offense – refer to Attachment A.

      3. Any felony conviction that the court finds was committed for sexual purposes.

      4. A violation of any of the offenses specified in Attachment A for which an inmate is criminally liable under section 53a-8, 53a-48 or 53a-49.

5. **Unit Responsibility.** A Classification Counselor shall review any inmate that is admitted to a level 3, 4, or 5 facility to determine if the inmate meets the criteria in section 4. If the inmate does not meet the

criteria for Sex Offender Registration, the Classification Counselor shall ensure that the RT50 screen is updated with an "N".

A. **Identification.** Identification shall be determined by reviewing the RT50 screen for past blood draws, judgement mitts, prior criminal history (i.e. prior judgement mitts, rap sheet, prior classification scores). Once identified, the Classification Counselor or the Facility contact Person shall ensure the following:

   1. Update the RT50 screen with a "Y".

   2. The Sex Offender Checklist (Attachment B) shall be initialed and placed on top of Section 3 of the master file. When using a two-part (jail file) file, place the Sex Offender Registration Checklist on top of Section 1. All other related Sex Offender Registration documents shall be placed under the Sex Offender Registration Checklist.

   3. An Inmate Notification Form (Attachment C) is completed, signed by the inmate and witnessed by a Classification Counselor. A Classification Counselor shall give a copy to the inmate. The original Inmate Notification Form shall be placed in Section 3 of the master file.

   4. Process the DNA Databank Submission Form (Attachment D):

      a. Complete Section I of the DNA Databank Submission Form.

      b. Send a copy of the DNA Databank Submission Form to the Facility Contact Person.

c. Facility Contact Person shall maintain a log book for all DNA Databank Submission forms for tracking. (see sample attached)

d. Original DNA Databank Submission Form shall be brought to the Health Service Unit.

e. The Health Services Unit shall complete Section II and Section III of the DNA Databank Submission Form. The Health Services Unit shall follow existing procedures pertaining to the DNA Databank Submission Form.

f. The Health Services Unit shall ensure that the courier receipt and the pink copy of the DNA Databank Submission Form are hand delivered to the Facility Contact Person for placement in Section 3 of the master file.

g. The Facility Contact Person shall update the Sex Offender Registration Checklist, the log book, and ensure the RT50 screen is updated to reflect date of blood draw.

h. Confirmation regarding the DNA Databank Submission Form from the State Police (yellow copy) shall be sent to the Facility Administrator. The Facility Administrator shall send the Confirmation to the Facility Contact Person who shall:

1. Update the Sex Offender Registration Checklist and the log book.

2. Remove the pink DNA Databank Submission form and attached courier receipt from Section 3 of the

master file and replace with the yellow DNA Databank Submission Form. The pink copy and the courier receipt shall be purged after the yellow copy is placed in the master file.

3. Update information on the RT50 screen to reflect the date confirmation (yellow copy) is received.

6. **Incarcerated Offender on Bond Awaiting Execution of Their Sentence.** In some cases, the court will convict an offender and stay execution of the sentence with the anticipation they will not return to the Department of Correction upon sentencing. In these cases, the court will provide the Department of Correction with a Sex Offender Certification Form (Attachment I), which will be attached to the continuance mittimus. The continuance mittimus will specify that a condition of the sentencing is that the defendant provide identifying factors and release to community registration information to the Department of Correction. Upon receipt of the continuance mittimus and the Sex Offender Certification Form, the Records Staff shall immediately forward a copy of the continuance mittimus and the original Sex Offender Certification Form to the Facility Contact Person. The Records Staff shall place the original continuance mittimus in Section 4 of the master file. The Facility Contact Person shall follow the procedures for obtaining a DNA blood sample as outlined in Section 5 and complete the Sex Offender Registration Form (Attachment F), as outlined in Section 10. Once these procedures have been completed, the Facility Contact Person shall complete the Sex Offender Certification Form and make two copies. One copy shall be given to the offender. The offender shall be instructed to bring the copy to the court. Another copy shall be placed in Section 3 of the master file. The original Sex Offender Certification

Form shall be delivered to the Records Staff. The Records Staff shall ensure the original Sex Offender Certification Form is sent to the court attached to a copy of the continuance mittimus with the offender on the next court date.

Please note, if an offender does not agree to the DNA Blood Draw or refuses to provide information to complete the Sex Offender Registration form (Attachment F), the refusal procedures for DNA Blood Draw and Release to the Community (as outlined in Sections 9 and 11) shall not be followed. The Facility Contact Person shall note the offender's refusal on the Sex Offender Certification Form.

7. **Bond Out/Release from Court Procedures.** All pre-trial inmates who are released to the community shall be issued the Inmate Release Notification Form (Attachment H). In the event there was a DNA Blood draw prior to the inmate being released on bond, the Facility Contact Person shall notify the Department of Public Safety-Sex Offender Registry telephonically and inform them that the inmate has bonded out and that the Sex Offender Registration process was not completed.

   In the event that the inmate is released from court without the Sex Offender Registration process being completed, the Facility Contact Person shall notify the Department of Public Safety-Sex Offender Registry telephonically.

8. **Changes in Conviction.** The Classification Counselor shall be aware that during the period of incarceration, changes in judgement mitts may occur; for example, a sentence modification may result in the need to purge the blood draw or it may change when the release to the community registration should occur. Records staff shall notify the Classification Counselor if

there is a change in conviction. If a blood draw needs to be purged, the Classification Counselor shall notify the Facility Contact Person who shall notify the Central Office Health Services contact person. The Sex Offender Registration Checklist and the RT50 screen shall be updated as appropriate.

9. **Inmate Refusal for DNA Blood Draw.** An inmate shall satisfy the conditions of the DNA testing guidelines set forth in this policy prior to release from the custody of the Department of Correction.

   Should an inmate refuse testing, the Correctional Hospital Nursing Supervisor or designee, shall have the inmate sign the DNA Refusal Form (Attachment E) and notify the Facility Administrator. Health Services shall forward the DNA Refusal Form to the Facility Contact Person. The DNA Refusal Form shall be placed in Section 3 of the master file. The Facility Administrator shall direct the Facility Contact Person to meet with the inmate to review the testing procedure and ensure the inmate has correct information regarding the purpose of the DNA testing and the requirements of the law. The Facility Contact Person shall advise the inmate that upon any further refusal, the Department of Correction shall make a request to the Office of the Attorney General to pursue a court order authorizing compulsory taking of a blood sample. A note of this meeting shall be entered on the Sex Offender Registration Checklist (Attachment B) located in Section 3 of the master file. After this counseling session, if the inmate consents to the DNA test, the Facility Administrator and Correctional Hospital Nursing Supervisor shall be notified, and the inmate scheduled for phlebotomy on the next regularly scheduled laboratory day. If the inmate again refuses, the Facility Contact Person shall notify the Central Office Health Services Contact Person for possible referral to the Office of the Attorney General.

10. **Registration of Sex Offender for Release to the Community.** A record specialist shall, during the 45-day end of sentence discharge review, notify the Facility Contact Person of the name of the inmate required to register. A record specialist shall also notify the Facility Contact person if an inmate is granted parole.

A. Criteria. An inmate who is convicted of one or more of the following:

1. Criminal Offense against a Minor-refer to Attachment A.

2. Sexually Violent Offense-refer to Attachment A.

3. Any felony conviction that the court finds was committed for sexual purposes.

4. A violation of any of the offenses specified in Attachment A for which an inmate is criminally liable under section 53a-8, 53a-48 or 43a-49.

B. The Facility Contact Person shall ensure the following:

1. A separate log book is maintained on all registration actions.

2. The Sex Offender Registration Form (Attachment F – previously titled Sexual Assault Convict Registration Form) is completed. The Sex Offender Advisement of Registration Requirement Form (Attachment G) is only completed for those inmates who are discharging end of sentence. Attached to these forms shall be a full set of current fingerprints and two current photographs that absolutely match the inmate.

3. The Sex Offender Registration Form (Attachment F) requires mental health information for a violent sex offender. This information should be provided by the inmate (self-disclosure) and does not require contacting the Mental Health Unit.

4. The original Sex Offender Registration Form (Attachment F), current fingerprints and two current photographs shall be sent to the Department of Public Safety – Sex Offender Registry by certified mail not less than 10 and no more than 30 days prior to the inmate's scheduled release date. If the inmate is discharging end of sentence the original Sex Offender Advisement of Registration Requirement Form (Attachment G) shall be sent with the Sex Offender Registration Form (Attachment F).

5. A copy of the Sex Offender Advisement of Registration Requirement Form (Attachment G) shall be given to the inmate when applicable.

6. A copy of the Sex Offender Registration Form, a copy of the Sex Offender Advisement of Registration Requirement Form, and the receipt for certified mail shall be placed in Section 3 of the master file. The receipt for certified mail shall be stapled to the Sex Offender Registration Form.

7. Place the Facility Contact Person's name and address on the return receipt (green card). The inmate's name and number shall be placed on the back of the return receipt bottom corner. When received, the certified mail return receipt shall be placed in Section 3 of

the master file and stapled to the Sex Offender Registration Form. If the inmate is transferred during this process, the return receipt shall be forwarded to the Facility Contact Person where the inmate is incarcerated.

8. If the return receipt has not been received within ten business days, the Facility Contact Person shall contact the Department of Public Safety – Sex Offender Registry.

9. Update the Sex Offender Registration Checklist.

11. **Inmate Refusal of Sex Offender Release to Community Registration.** The Facility Contact person shall determine if an inmate is being released to parole or end of sentence.

If the inmate refuses to complete the Sex Offender Registration form when being released to parole the Facility Contact Person shall notify the Board of Parole, who shall advise of any changes in status.

If the inmate refuses to complete the Sex Offender Registration Form when being discharged to end of sentence and the inmate has statutory good time, the Facility Contact Person shall notify the Director of Offender Classification and Population Management to determine further action. If there is no statutory good time, the Sex Offender Registration form and the Sex Offender Advisement of Registration Requirement Form shall be completed with the available information, signed and dated by the Facility Contact Person. It shall be noted on the forms that the inmate refused to complete both forms. The original Sex Offender Registration Form and the original Sex Offender Advisement of Registration Form shall be forwarded to the Department of Public Safety – Sex Offender Registry. The Facility Contact person shall

place a copy of the Sex Offender Registration Form and the Sex Offender Advisement of Registration Requirement Form in Section 3 of the master file and update the Sex Offender Registration Checklist

12. **Readmission.** Upon readmission of a sex offender, the Classification Counselor shall review the Discharge Section of the master file for the previous Sex Offender Checklist and update the new Sex Offender Registration Checklist (DNA is only required to be drawn once). The DNA Databank Submission Form shall remain in Section 3 of the master file with the new Sex Offender Registration Checklist. The Classification Counselor shall make a copy of both forms and forward them to the Facility Contact Person. All previous forms, to include the Sex Offender Registration Checklist, the Sex Offender Registration Form and the Inmate Notification Form shall remain in the Discharge Section of the master file.

13. **Inmate Notification.** Each Facility Administrator shall notify the inmate population of the requirements of the Registration of Sex Offenders by placing a notice of such in each inmate housing unit. All inmates who are being released from the Department of Correction to include end of sentence, parole, bond, or any other releasing mechanism shall be issued the Inmate Release Notification form (Attachment H).

14. **Reports and Monitoring.** To provide assistance in implementing department policy concerning sex offender registration, the Research Unit shall generate a report that lists each inmate in that facility who meets the criteria for sex offender registration and shall submit such report to each Facility Administrator and Facility Contact Person on a monthly basis. The Research Unit shall also provide a report that

lists each inmate in that facility who meets the criteria for sex offender registration and is within 120 days of release and shall submit such report to the Facility Administrator and the Facility Contact Person on a monthly basis. The Research Unit shall maintain copies of the reports sent to each facility. The Sex Offender Registration process shall be monitored periodically by staff of the Offender Classification & Population Management Unit, the Health Services Unit and the Research Unit.

ATTACHMENT A

Registration of Sex Offenders for DNA Blood Draw/Release to the Community

I. <u>Criminal Offense Against a Minor (Imposes a 10 year registration requirement)</u>

"M"

53-21(2)	Risk of injury to or impairing moral of children	(CF)
53a-70(a)(2)	Sexual Assault 1st	(BF)
53a-71(a)(1)	Sexual Assault 2nd	(CF)
53a-71(a)(4)	Sexual assault 2nd	(CF)
53a-71(a)(8)	Sexual Assault 2nd	(CF)
53a-72a(a)(2)	Sexual Assault 3rd	(DF)
53a-73a(a)(6)	Sexual Assault 4th	(AM)
53a-73a(a)(1)(D)	Sexual Assault 4th	(AM)
53a-73a(a)(1)(A)	Sexual Assault 4th	(AM)
53a-86(a)(2)	Promoting Prostitution 1st	(BF)
53a-87(a)(2)	Promoting Prostitution 2nd	(CF)
53a-196a	Employing a minor in an obscene performance	(AF)
53a-196b	Promoting a minor in an obscene performance	(BF)

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<u>or if the court finds on or after 10/1/98 at the time of the offense the victim was under 18 years of age:</u>

53a-92	Kidnapping 1st	(AF)
53a-92a	Kidnapping 1st	(AF)
53a-94	Kidnapping 2nd	(BF)
53a-94a	Kidnapping 2nd	(BF)
53a-95	Unlawful Restraint 1st	(DF)
53a-96	Unlawful Restraint 2nd	(AM)
53a-186	Public Indecency	(BM)

<u>or any of the above where the person is criminally liable under</u>:

53a-8	Criminal liability for acts of another
53a-48	Conspiracy
53a-49	Criminal attempt

II. <u>Sexually Violent Offense (Imposes a lifetime registration requirement unless otherwise released from the obligation)</u>

"V"

53a-70	Sexual Assault 1st	(BF)
53a-70a	Aggravated Sexual Assault 1st	(BF)
53a-70b	Sexual Assault in spousal or cohabiting relationship	(BF)
53a-71	Sexual Assault 2nd	(CF)
53a-72a	Sexual Assault 3rd	(DF)
53a-72b	Sexual Assault 3rd with a firearm	(DF)
53a-73a	Sexual Assault 4th	(AM)

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Except the following (which are classified as Criminal Offenses Against a Minor)

53a-70(a)(2)	Sexual Assault 1st	(BF)
53a-71(a)(1)	Sexual Assault 2nd	(CF)
53a-71(a)(4)	Sexual Assault 2nd	(CF)
53a-71(a)(8)	Sexual Assault 2nd	(CF)
53a-72a(a)(2)	Sexual Assault 3rd	(DF)
53a-73a(a)(1)(A)	Sexual Assault 4th	(AM)
53a-73a(a)(1)(D)	Sexual Assault 4th	(AM)
53a-73a(a)(6)	Sexual Assault 4th	(AM)

or if the court finds on or after 10/1/98 an intent to sexually violate or abuse the victim:

53a-92	Kidnapping 1st	(AF)
53a-92a	Kidnapping 1st	(AF)

or any of the above where the person is criminally liable under:

53a-8	Criminal liability for acts of another
53a-48	Conspiracy
53a-49	Criminal attempt

III. Any felony that the court finds on or after 10/1/98 was committed for sexual purposes.

"P"

REV 9/30/98

ATTACHMENT B – SEX OFFENDER REGISTRATION CHECKLIST

Originating Facility _____ Date _____
Inmate Name _____ Inmate Number _____

SECTION I: REGISTRATION DNA BLOOD DRAW

A.

State Statute/Offense Title_____
If convicted on or after 10/1/98 circle: **M V P**

Inmate Notification Form completed Date _____
Completed Section 1 of the DNA Databank Submission Form Date _____
DNA Databank Submission Form sent to the Health Services Unit Date _____
Copy of DNA Databank Submission Form and Inmate Notification Form sent to Facility Contact Person Date _____

Completed by

_____ _____ _____
Print Name Signature Date

B.

Pink copy of the DNA Databank Submission Form and courier receipt placed in section 3 of the master file.
Completed by

_____ _____ _____
Print Name Signature Date

REV 9/30/98

Yellow copy of the DNA Databank Submission Form placed in section 3 of the master file upon receipt from the CT State Police. Pink copy [illegible]
Completed by

Print Name	Signature	Date

SECTION II: REGISTRATION RELEASE TO COMMUNITY

Sex Offender Registration Form, Sex Offender Advisement of Registration Requirement Form (Only for inmates discharging end of sentence), two photographs and fingerprints completed and mailed to Department of Public Safety – Sex Offender Registry. Receipt for certified mail placed section 3 of the master file stapled to the Sex Offender Registration Form
Completed by

Print Name	Signature	Date

Certified Mail Return Receipt (green card) placed in section 3 of the master file stapled to the sex Offender Registration Form.
Completed by

Print Name	Signature	Date

SECTION III: INMATE REFUSAL
A. Inmate Refusal of DNA Draw

Inmate refused DNA testing. DNA Refusal Form placed in section 3 of the master file.
Completed by

Print Name	Signature	Date

REV 9/30/98

The Facility Contact Person met with the inmate to review the DNA testing procedure.
Completed by

Print Name	Signature	Date

Facility Contact Person notified Central Office Health Services Contact Person if inmate still refuses DNA testing.
Completed by

Print Name	Signature	Date

Additional actions taken regarding DNA testing refusal. (If additional space is needed, attach to checklist)

_____
Completed by

Print Name	Signature	Date

B. Inmate Refusal Sex Offender Registration
Sex Offender Registration Form and Sex Offender Advisement of Registration Requirement Form completed without residence information and forwarded to the Department of Public Safety – Sex Offender Registry.
Completed by

Print Name	Signature	Date

Additional actions taken _____

REV 9/30/98

ATTACHMENT C

INMATE NOTIFICATION FORM
SUMMARY REGISTRATION AGREEMENT
CONNECTICUT DEPARTMENT OF CORRECTION

TO:

FROM:

DATE:

RE: PUBLIC ACT 98-111

In accordance with the requirements of Public Act 98-111, an act concerning the registration of sex offenders, the Connecticut Department of Correction hereby notifies you of the following obligations:

1) Upon admission, a blood sample to be used for Deoxyribonucleic Acid (DNA) identification analysis shall be taken from you as you meet the criteria of Public Act 98-111. I understand that if I refuse, the Connecticut Department of Correction may request that the Attorney General's Office seek a court order authorizing the use of force, if necessary, to obtain such blood sample.

2) Prior to discharge, you will be required to submit to a photograph, fingerprints and provide information regarding residence to be used to complete the Department of Public Safety Sex Offender Registration Form.

3) Since you meet the criteria of Public Act 98-111, you are being issued a copy of the Public Act and will be responsible for all obligations required upon your release from the custody of the Department of Correction.

4) In the event that you are released from the Connecticut Department of Correction (i.e., bond out, release from court, release to parole, end of sentence or any other releasing mechanism) and all the requirements for registration have not been completed (DNA blood draw, photograph, fingerprints and Release to the Community Registration forms), you are required to contact the Department of Public Safety-Sex Offender Registry, pursuant to Public Act 98-111, to complete the registration process.

I acknowledge being advised and issued a copy of Public Act 98-111.

Inmate Signature	Date
Staff Witness	Date

Check One

( ) Inmate refused to sign, but accepted a copy of Public Act 98-111.

( ) Inmate refused to sign. Copy of Public Act 98-111 sent to inmate in a sealed envelope via regular institutional mail.

10/16/98

ATTACHMENT D

CONNECTICUT DEPARTMENT OF CORRECTION

DNA DATABANK SUBMISSION FORM

Date: _____

SECTION I:
To Be Completed By The Holding Facility:

Submitting Agency: Department of Correction/Facility:

Inmate Name: _____
Last First

Inmate Number: _____ SPBI Number: _____

Social Security Number: ☐☐☐-☐☐-☐☐☐☐ ☐ Not Known

Date of Birth: _____ Gender: ☐ Male ☐ Female

Race: ☐ White ☐ Black ☐ Hispanic ☐ Asian
☐ Native American ☐ Other

State Statute: _____ Offense Title: _____

Is Offense: ☐ Against Minor (M) ☐ Violent (V)
☐ Sexual Purpose (P)

Date of Discharge: _____

Staff Member Who Completed Form: _____ _____
Print Name Signature

_____

SECTION II:
To Be Completed By Health Services Staff:

Date of Sample Collection: _____

Sample Collected By: _____

_____

SECTION III:
To Be Completed By Staff Assigned To Transmit Samples:

Date Transmitted: _____

Hand Deliver Courier Receipt to Facility Contact Person

Completed By: _____ _____

_____

SECTION IV:
To Be Completed By Connecticut State Police (CSP):

Date Received By CSP: _____

Submitting Agency Case #: _____

Laboratory Case #: _____

INSTRUCTIONS: White Copy to State Police.

Yellow Copy to State Police for completion and return to D

Pink Copy temporarily placed in inmate master file pending return of yellow copy. Purged after yellow copy filed.

_____

ATTACHMENT E

CONNECTICUT DEPARTMENT OF CORRECTION

DNA REFUSAL FORM

INMATE NAME: _____

INMATE NUMBER: _____

DATE OF BIRTH: _____

SEX: _____

FACILITY: _____

I understand that Public Act 98-111 requires that I have a sample of my blood taken for DNA (Deoxyribonucleic Acid) analysis. I have refused to have a sample of my blood taken for such DNA analysis. I understand that as a result of my refusal, the Connecticut Department of Correction may request that the Attorney General's Office seek a court order authorizing the use of force, if necessary, to obtain such blood sample.

INMATE SIGNATURE:

_____ DATE: _____

WITNESS SIGNATURE:

_____ DATE: _____

WITNESS SIGNATURE:

_____ DATE: _____

* Two (2) witnesses MUST sign the DNA refusal form.

Instructions: White Copy – Inmate
Yellow Copy – Master File
Pink Copy – Health Record

( ) Inmate refused to sign DNA refusal form and accepted a copy.

( ) Inmate refused to sign DNA refusal form and did not accept a copy.

Rev. 09/03/98

ATTACHMENT F

State of Connecticut
Department of Public Safety

Sex Offender Registration Form

☐ Initial Registration ☐ Change of Address *(Registering agency personnel must print or type all entries)*

Last Name	First Name	Middle Initial

Current or Intended Address *(No P.O. boxes)* & other identifying information

Number & Street	City or Town	Apt # (if any)	Zip Code

List Any Alias or Any Other Name(s) Used	Visible Scars, Marks, Tattoos

Conviction/Adjudication Date	Release Date	Court Name/Location/State	Current Status (✓ if applicable) ☐ On Probation ☐ On Parole

SPBI Number	DOB	Race (check all that apply) ☐ White ☐ Asian ☐ Hispanic ☐ Black ☐ Native American ☐ Other

CT/DOC Inmate Number	Sex	Height	Weight	Hair Color	Eye Color	Skin Complexion/Tone

The person named above was convicted or found not guilty by reason of mental disease or defect of:(✓ *all that apply*)

(Public Act 98-111 Section 2) which includes one of the following crimes against a victim who was a minor : (Code M)

Sections ☐ 53-21(2); ☐ 53a-70(a)(2); ☐ 53a-71(a)(1), (a)(4), or (a)(8); ☐ 53a-72a (a)(2) ☐ 53a-73a(a)(1)(A), (a)(1)(D) or (a)(6); ☐ 53a-86(a)(2) ☐ 53a-87(a)(2); ☐ 53a-196a ☐ 53a-196b; or

One of the following crimes and the court finds that at the time of the offense the *victim was under the age of 18 years:*

☐ 53a-92; ☐ 53a-92a; ☐ 53a-94; ☐ 53a-94a; ☐ 53a-95; ☐ 53a-96 ☐ 53a-186; or

(Public Act 98-111 Section 3) a sexually violent offense, such as one or more of the following crimes: (CodeV)

☐ 53a-70; *except (a)(2)* ☐ 53a-70a; ☐ 53a-70b ☐ 53a-71 *(except (a)(1), (4) & (8)* ☐ 53a-72a; (except (a)(2) ☐ 53a-72b ☐ 53a-73a; *except (a)(1)(A), (a)(1)(D), or (a)(6)* ☐ 53a-92; or ☐ 53a-92a;

Has Offender Received Mental Health Treatment ? *(violent sex offenders only)* ☐ Yes ☐ No If "Yes" When & Where ?

(Mental Health Information Is Not Subject To Public Disclosure)

(Public Act 98-111 Section 4) was a person who:

☐ Was *convicted in another jurisdiction* of any crime, the essential elements of which are substantially the same as any of the crimes listed above, or of

(Public Act 98-111 Section 5) was a person who was convicted of: (Code P)

☐ Any felony that the court finds was committed for sexual purposes and who is *required by the court* upon release into the community to register with the Commissioner of Public Safety

Check all tasks performed: ☐ Photograph Taken ☐ Fingerprints Taken ☐ DNA Sample Obtained

Name & Title	*Badge Number If Applicable*	*Date*

Name/Address of Registering Agency	*Agency Telephone*

Signature of Registrant	Date of Registration

A full registration requires all of the following: completion of this form, a full set of fingerprints and a photograph taken at the time of registration and a blood sample taken for the purposes of DNA analysis

102

Failure to Complete ALL Registration Requirements is a Class D Felony

Send To: Department of Public Safety -- Sex Offender Registry P.O. Box 2794 Middletown, CT 06457-----

Who Must Register As a Sex Offender in Connecticut?

Pursuant to the below listed sections of Public Act 98-111, the following persons must register in Connecticut as a sex offender if they are:

Public Act 98-111 Sec. 2 (for a period of 10 years)

A person who was released into the community on or after October 1, 1998, and has been convicted or found not guilty by reason of mental disease or defect of a criminal offense listed below against a *victim who was a minor*:

Sections [ ] 53-21(2);
[ ] 53a-70(a)(2);
[ ] 53a-71(a)(1), (a)(4), or (a)(8);
[ ] 53a-72a(a)(2)
[ ] 53a-73a(a)(1)(A), (a)(1)(D) or (a)(6);
[ ] 53a-86(a)(2)
[ ] 53a-87(a)(2);
[ ] 53a-196a
[ ] 53a-196b; or

A person who has been convicted or found not guilty by reason of mental disease or defect of any of the following crimes:

[ ] 53a-92; [ ] 53a-94; [ ] 531-95; [ ] 53a-186; or
[ ] 53a-92a; [ ] 53a-94a; [ ] 53a-96

the time of the offense or any of the foregoing if there is criminal liability pursuant to Sections 53a-8, /53a-48 or 53a-49, or

Public Act 98-111 Sec. 3 (for a period of not less than 10 years)

A person who was released into the community on or after October 1, 1988, and has been convicted or found not

guilty by reason of mental disease or defect of a *sexually violent offense as listed below*:

[ ] 53a-70; *except (a)(2)*
[ ] 53a-71 *(except (a)(1), (a)(4) & (a)(8)*
[ ] 53a-70a;
[ ] 53a-72a; (except (a)(2)
[ ] 53a-70b
[ ] 53a-72b

[ ] 53a-73a; *except (a)(1)(A), (a)(1)(D), or (a)(6)*
[ ] 53a-92; or
[ ] 53a-92a; provided the court makes a finding that the offense was committed with the intent to sexually violate or abuse the victim; or a was [sic] violation of any of the offenses specified above for which a person is criminally liable under Sections 53a-8, 53a-48, 53a-49, of the Connecticut General Statutes; or

Public Act 98-111 Sec. 4

A person who has been convicted or found not guilty by reason of mental disease or defect in a federal or military court or in any foreign jurisdiction of any crime, the *essential elements of which are substantially the same* as any of the crimes listed above; or

Public Act 98-111 Sec. 5

A person who has been convicted or found not guilty by reason of mental disease or defect in this state on or after October 1, 1998, of any felony that the court found was *committed for sexual purposes* and is required by the court upon release into the community to register with the Commissioner of Public Safety as required by law.

Important Information Concerning Public Act 98-111

"Registrant" means a person required to register under Section 2, 3, 4, or 5 of this act. (PA 98-111Sec. 1)

For registration purposes, the term **"Conviction"** means a judgment entered by a court upon a plea of guilty, a plea of nolo contendere or a finding of guilty by a jury or the court. (Public Act 98-111 Sec 1.)

"Identifying factors" means fingerprints, photographs, and a description of any other identifying characteristics as may be required by the Commissioner of Public Safety. The commissioner shall also require a sample of the registrant's blood taken for a DNA (deoxyribonucleic acid) analysis, unless such sample has been previously obtained in accordance with Section 53a-102g of the general statutes. (Public Act 98-111 Sec. 1)

A person required to register under Section 3 of Public Act 98-111 shall be required to maintain his registration for not less than ten years from the date of his release into the community, after which he may apply to the court in which he was convicted or found not guilty by reason of mental disease or defect for release from the obligation to register (Public Act 98-111 Sec. 6)

The Department of Public Safety, state police troops and local police departments shall not disclose the identity of any victim of a crime committed by a registrant or treatment information provided to the registry pursuant to this act except to government agencies for bona fide law enforcement or security purposes. (Public Act 98-111 Sec. 9)

The Department of Public Safety shall verify the address of each registrant by mailing a nonforwardable verification for the registrant at his last reported address. . . . Each person required to register under Section 2 or 5 of this act shall have his address verified in such a manner every ninety days after his initial registration date. Each person required to register under Section 4 of this act shall have his address verified in such manner either annually on the anniversary of his initial registration date or every 90 days after his initial registration date depending upon whether, after such initial registration, he is subject to the requirements of Section 2 or Section 3, respectively, of this Act. . . . (Public Act 98-111 Sec. 8)

ATTACHMENT G

State of Connecticut
Department of Public Safety

Sex Offender Advisement of Registration Requirement
Unconditional Release

ne Commissioner of Public Safety, please be advised that:

t Name	First Name	Middle	Date of Release Into Community	SPBI Number

eleased to reside at the following address

nber & Street *(No P.O. Box)*	City/Town	ZIP Code

person named above was convicted or found not guilty by reason of mental disease or defect of:
all that apply)

iblic Act 98-111 Section 2) which includes one of the following crimes against *a victim who was a minor : (Code M)*

tions
- ☐ 53-21(2);
- ☐ 53a-70(a)(2);
- ☐ 53a-71(a)(1);, (a)(4), or (a)(8)
- ☐ 53a-72a (a)(2);
- ☐ 53a-73a(a)(1)(A); (a)(1)(D) or (a)(6);
- ☐ 53a-86(a)(2);
- ☐ 53a-87(a)(2);
- ☐ 53a-196a;
- ☐ 53a-196b; or

of the following crimes and the court finds that at the time of the offense the *victim was under the age of 18 years:*

- ☐ 53a-92;
- ☐ 53a-92a;
- ☐ 53a-94;
- ☐ 53a-94a;
- ☐ 53a-95;
- ☐ 53a-96; or
- ☐ 53a-186;

blic Act 98-111 Section 3) a sexually violent offense, such as one or more of the following crimes: (CodeV)

- ☐ 53a-70; *except (a)(2)*
- ☐ 53a-70a;
- ☐ 53a-70b;
- ☐ 53a-71; *except (a)(1), (4) & (8)*
- ☐ 53a-72a; except (a)(2)
- ☐ 53a-72b;
- ☐ 53a-73a; *except (a)(1)(A), (a)(1)(D), or (a)(6)*
- ☐ 53a-92;
- ☐ 53a-92a;

Offender Received Mental Health Treatment ? *(violent sex offenders only)* ☐ Yes ☐ No If "Yes" When/Where ?

(Mental Health Information Is Not Subject To Public Disclosure)

lic Act 98-111 Section 4) was a person who:

☐ Was *convicted in another jurisdiction* of any crime, the essential elements of which are substantially the same as any of the crimes listed above, or of

lic Act 98-111 Section 5) was a person who was convicted of: *(Code P)*

☐ Any felony that the court finds was committed for sexual purposes and who is *required by the court* upon release into the community to register with the Commissioner of Public Safety

e informed the person identified above of the obligation to register within three days with the Commissioner of Public ty for a period of ten years following the date of his or her release date or until otherwise released from such obligation ccordance with Sec. 6 of Public Act 98-111, and also of the obligation that whenever this offender changes address, he ie shall provide the commissioner with written notice of any such change within five days and shall also register with ppropriate law enforcement agency if he moves to another state. This person shall be provided a copy of this form.

ying Official	Releasing Organization/Agency
Signature *Title* *Date*	

nowledge receipt of this form by signing below:

Signature of Registrant *Date*

694-C2 (New 9/29/98)

Notice to Registrants

As a person who has been convicted of a crime as specified in Public Act # 98-111 as indicated on the front of this form or as a person who is otherwise required to register with the Sex Offender Registry, you must report to a Connecticut State Police location as indicated below and comply with the registration requirements of Public Act 98-111, which requires the submission of certain identifying factors as determined by the Commissioner of Public Safety.

Failure to comply with registration requirements is a Class D Felony.

After completing the initial registration you will be required to return address verification forms that have been mailed to you. Address verification forms shall be returned to the Department of Public Safety at P.O. Box 2794 Middletown, CT 06457-9294. You must also notify the Department of Public Safety within 5 days of changing your address and to notify the appropriate law enforcement authorities if you move to another state. Failure to comply with any of the foregoing requirements will make you subject to arrest for committing a Class D felony.

Department of Public Safety Sex Offender Registry Locations

Registrations will be processed at the following locations, *except on federal and state holidays*, as follows: Monday – Wednesday – Friday at all listed locations between 8:00 A.M. 12:00 P.M. and from 12:30 P.M. to 4:00 P.M. The troops in Montville and Bridgeport will also conduct registrations on Saturday during the same hours of the day.

TOLLAND
Troop "C" 800-318-7633
1320 Tolland Stage Road
(I-84 Exit 69)
Tolland, CT 06084

BRIDGEPORT
Troop "G" 800-575-6330
149 Prospect St.
(I-95 Exit 27)
Bridgeport, CT 06604

LITCHFIELD
Troop "L" 800-953-9949
452B Bantam Road
(Route 22)
Litchfield, CT 06759

MONTVILLE
Troop "E" 800-953-7747
I-395 Northbound between
Exits 79 and 79-A
Uncasville, CT 06382

In addition, registrations can be performed at the following location any weekday, Monday through Friday, *except on federal and state holidays*, between the hours of 8:30 A.M. to 4:00 P.M. as follows:

MIDDLETOWN
Department of Public Safety Headquarters
(860) 685-8060
1111 Country Club Road (I-91 Exit 20)
Middletown, CT 06457-9294

ATTACHMENT H

INMATE RELEASE NOTIFICATION FORM
CONNECTICUT DEPARTMENT OF CORRECTION

TO: Inmates Being Released to End of Sentence, Parole, Bond, or Any Other Releasing Mechanism

FROM: Department of Correction

RE: PUBLIC ACT 98-111

* * * * * * * * * * * * * * * * * * *

In accordance with the requirements of Public Act 98-111, an act concerning the registration of sex offenders, the Connecticut Department of Correction hereby notifies you of the following information:

This act requires any person released into the community on or after October 1, 1998, who was convicted or found not guilty by reason of mental disease or defect of certain crimes to register as a sexual offender. There are three categories of offenses that will require an offender to register as a sexual offender. The categories are: criminal offenses against a victim who is a minor (ten year registration); sexually violent offenses (potential lifetime registration); and any felony that the court deems was committed for sexual purposes (ten year registration).

The act also creates the new crime of failure to register as a sexual offender, which is a class D felony.

If you have ever been convicted of an offense identified in any of the above categories in the State of Connecticut or any other jurisdiction, you should contact the Department of Public Safety – Sex Offender Registry, P.O. Box 2794, Middletown, CT 06457-9294.

9/30/98

Sex Offender Certification Form

ATTACHMENT I

Instructions: (1) Clerk: Complete Part 1 and have the offender Sign Part IV. Provide original to offender, keep one copy for court file

(2) DOC or DPS: Complete Part II when identifying factors are received, keep a copy and give one copy to the offender, or attach a mittimus, to be returned to the court

(3) Clerk: Complete Part III upon return of form with certification by DPS or DOC, or upon expiration of time to return form.

(4) Clerk: Provide original to the Sex Offender Registry, retain one copy, and provide one comply to offender

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Part I.

Court Location	Docket No.(s)
Name	DOB

The above named defendant has been ordered by the court to supply fingerprints, photographs and a blood sample for DNA analysis and to provide certification to the court of compliance with said order.

The offender must return to the court location noted above on (date)_____ with certification that these identifying

factors have been obtained for the Department of Public Safety.

Part II. Certification – To be Completed by the Department of Public Safety or Department of Correction

I hereby certify that photograph, fingerprints and blood sample for DNA analysis have been obtained for the Commissioner of Public Safety from the above named offender.

Case Number/Inmate Number	☐ Submitted by DPS ☐ Submitted by DOC

Name and Title	Badge Number (if applicable)	Date

Part III. For Court Use – Check one box upon return of form or expiration of time to return form:

☐ Completed Certification received by the court on _____

☐ Certification not returned as required by the offender and the court took the following action (if applicable)

_____

Clerk	Date

Part IV. For Offender – Acknowledgement of Receipt of This Form

I acknowledge receipt of this form from the court from which I was convicted. I understand and agree that the Commissioner of Public Safety must obtain my fingerprints, photograph and a blood sample for DNA analysis. I further agree and understand that I must return to court on the date noted in Section 1 above and supply the court with this certification form completed by the Department of Public Safety or, if I am in lieu of blood, by the Department of Correction.

Department of Public Safety Sex Offender Registry Locations

Registrations will be processed at the following locations, *except on federal and state holidays*, as follows Monday – Wednesday – Friday at all listed locations between 8:00 A.M. 12:00 P.M. and from 12:30 P.M. to 4:00 P.M. The troops in Montville and Bridgeport will also conduct registrations Saturday during the same hours of the day.

TOLLAND
Troop "C" 800-318-7633
1320 Tolland Stage Road
(I-84 Exit 69)
Tolland, CT 06084

BRIDGEPORT
Troop "G" 800-575-6330
149 Prospect St.
(I-95 Exit 27)
Bridgeport, CT 06604

LITCHFIELD
Troop "L" 800-953-9949
452B Bantam Road
(Route 202)
Litchfield, CT 06759

MONTVILLE
Troop "E" 800-953-7747
I-395 Northbound between
Exits 79 and 79-A
Uncasville, CT 06382

In addition, registrations can be performed at the following location any weekday, Monday through Friday, *except on federal and state holidays*, between the hours of 8:30 A.M. to 4:00 P.M. as follows:

MIDDLETOWN
Department of Public Safety Headquarters
(860) 685-8060
111 Country Club Road (I-91 Exit 20)
Middletown, CT 06457-9294

CONNECTICUT OFFICE OF ADULT PROBATION

Sex Offender Notification Policy

10/20/98

The Office of Adult Probation Sex Offender Notification Policy is subdivided into three sections. These are: A. Notifying applicable sex offenders under probation supervision that they are required to register and providing them with information to assist them in complying with the laws for registration; B. Providing the State Police with timely information about sex offenders who are required to register in order to facilitate registration requirements; and C. Providing information to residents and others in the community when it is deemed necessary to prevent someone from being victimized by a sex offender. These policies, and the procedures for implementation are presented below.

A. Notification to Sex Offender of Registration Requirements (P.A. 98-111)

Policy

All persons under the supervision of the Office of Adult Probation who must register under Public Act 98-111 will be informed by their probation officer of the requirement to register with the State Police and to maintain registration requirements.

Procedures

Sex offenders under probation supervision will be given registration instructions by their probation officer which will include the following:

-the probationer's obligation to maintain registration for a minimum of 10 years

-the probationer's obligation to comply with address verification as required by the State policy

-the probationer's obligation to notify the State Police in writing within 5 days of changing his or her address. (see also procedures under section B)

-the requirement for persons transferred to other states to register with law enforcement in the new state.

-the requirement for sex offenders transferred from other states to register with the State Police within 10 days of establishing a residence in Connecticut.

The probation officer will verify registration of these cases with the State Police within one week of being assigned the case either for investigation or supervision. Questions regarding registration applicability will be forwarded to the District manager.

-the requirement to submit a blood sample for DNA analysis

-the process and paperwork necessary for compliance

-the penalty for failure to comply with registration requirements (class D Felony)

Persons under Adult Probation supervision who *were previously* required to register with local police under CGS 54-102r or who have previously registered will be informed that they most now register (or re-register) with the State Police prior to January 1, 1999. *Specific instructions for compliance will be mailed to applicable probationers by the State Police.*

B. Notification to State Police of information on changes in the residence address or status of probationers who are required to register under P.a. 98-111

Policy

Information on convicted sex offenders who are under the supervision of the Office of Adult Probation will be provided to the State Police in order to facilitate the timely and consistent registration of sex offenders. as required by Public Act 98-111.

Procedures

All Probationers Required to Register Under PA-98-111

OAP will notify the State and local Police whenever a probationer who is required to register changes his/her address:

-a Sex Offender Registration Form (DPS-694-C) with the Change of Address box checked and including the probationer's name, DOB and new address will be forwarded to both the State and local Police within 24 hours of determining that the probationer has changed their residence address.

-the probation officer will, within 3 days of learning that the probationer has changed their address, notify the probationer of their legal requirement to re-register with the State Police within 5 days of a change of address.

APOLIS will be updated within 24 hours of receipt of notification of change of address

OAP will notify the State and local Police within 24 hours of determination that a probationer required to register under P.A. 98-111 has absconded.

OAP will enter information on all probationers who are required to register into the FL-17 screen of COLLECT. This information will include any relevant special conditions, in particular no contact orders, and an indication that the probationer is a registered sex offender.

C. Community Notification

Neither past nor current legislation requires the Office of Adult Probation to conduct sex offender notification in the community. An executive committee has been established to study this issue, however, and will make recommendations to the legislature at a future date. The Adult Probation policy in this area addresses circumstances when officers have reason to believe that a sex offender presents an imminent danger to an identifiable person or group. In those circumstances the officer will consult with appropriate supervisors and other officials to determine the best course of action.

Policy

Residents and/or other members of the community will be provided information about sex offenders under those circumstances when it is believed that such notification is necessary to prevent a person from being victimized by the sex offender.

Procedures

When a probation officer has reason to believe that a sex offender poses a specific risk to an identifiable person or group of persons they will consult with their supervisor to determine whether or not notification should be given to these parties.

The State and/or local police will be consulted to determine whether or not they will conduct the notification.

The District Manager will be consulted for further directions.

APPENDIX

The Office of Adult Probation Sex Offender Notification Policy applies to persons under probation supervision who are required to register as sexual offenders under Public Act 98-111.

Applicable Cases:

There are *five* categories of cases that are required to register under the new law. These include:

- Persons who are required to register under current law (CGS 54-102r) (10 year registration)
- Persons convicted or found not guilty by reason of mental disease of a criminal offense against a minor and released into the community on or after 10/1/98 (10 year registration)
- Persons convicted or found not guilty by reason of mental disease or defect of a sexually violent offense

and released into the community on or after 10/1/98 (potential lifetime registration)

- Persons convicted of similar sex offenses in other states and transferred to Connecticut under the Interstate Compact (10 year registration from time of release to community in other state)

These categories, and their related offenses, are described below:

1. All persons under the supervision of the Office of Adult Probation convicted of one or more of the following offenses prior to 10/1/98 and required to register with local police under CGS 54-102r:

53a-70	Sexual Assault, 1'st degree
53a-70a	Aggravated Sexual Assault, 1'st degree
53a-70b	Sexual Assault in a Spousal Relationship
53a-71	Sexual Assault, 2'nd degree
53a-72a	Sexual Assault, 3'rd degree
53a-72b	Sexual Assault with Firearm, 3'rd degree
53-21(2)	Injury or Risk of Injury to a Minor, subdivision 2

2. All persons under the supervision of the Office of Adult probation who have been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor and released into the community on or after 10/1/98.

Applicable offenses:

53-21(2)	Injury or Risk of Injury to a Minor
53a-70(a)(2)	Sexual Assault 1'st
53a 71(a), subdivision 1, 4 or 8	Sexual Assault 2'nd
53a-72a(a)(2)	Sexual Assault 3'rd
53a-73a(a)(1)(A), (a)(1)(D) or (a)(6)	Sexual Assault 4'th
53a-86(a)(2)	Promoting Prostitution 1'st
53a-87(a)(2)	Promoting Prostitution 2'nd
53a-196a	Employing Minor in an Obscene Performance
53a-196b	Employing Minor in an Obscene Performance

or. One of the following crimes and the court finds that at the time of the offense the victim was under the age of 18 years:

53a-92, 53a-92a	Kidnapping 1'st
53a-94, 53a-94a	Kidnapping 2'nd
53a-95	Unlawful Restraint 1'st
53a-96	Unlawful Restraint 2'nd
53a-186	Public Indecency

or any of the above where the person is criminally liable under:

53a-8	Criminal Liability for Acts of Another
53a-48	Conspiracy
53a-49	Criminal Attempt

3. All persons under the Supervision of the Office of Adult Probation who have been convicted or found not guilty by reason of mental disease or defect of a

sexually violent offense and released into the community on or after 10/1/88.

Applicable Offenses:

53a-70 (a) (1)(3)	Sexual Assault 1'st
53a-70a	Aggravated Sexual Assault 1'st
53a-70b	Sexual Assault in a Spousal or Cohabiting Relationship
53a 71(a) subdivision 2, 3, 5, 6, or 7	Sexual Assault 2'nd
53a-72a (a)(1)	Sexual Assault 3'rd
53a-72b	Sexual Assault 3'rd with Firearm
53a-73a (a)(1)(B, C, or E)	Sexual Assault 4'th
53a-73a (a) (2, 3, 4, or 5)	Sexual Assault 4'th

or, if intent to sexually violate or abuse the victim:

53a-92, 53a-92a	Kidnapping 1'st

or any of the above where the person is criminally liable under:

53a-8	Criminal Liability for Acts of Another
53a-48	Conspiracy
53a-49	Criminal Attempt

or any felony that the court finds was committed for sexual purposes (10 year registration)

4. All persons under the supervision of the Office of Adult Probation who have been convicted in other states of offenses similar to those requiring registration under CGS 54-102r or P.A. 98-111 and whose supervision has been transferred to Connecticut under the terms of the Interstate Compact.

5. Any person who has been convicted or found not guilty by reason of mental disease or defect in this state on or after 10/1/98, of any felony that the court finds was committed for sexual purposes and for which the court requires registration.

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go to text version

State of Connecticut

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FAQs

Frequently Asked Questions

Connecticut Income Tax Forms . . .
Relocation to Connecticut . . .
Opening a Business in Connecticut . . .
Finding a Job/State Employment . . .
Facts and Information about Connecticut . . .
Contacting Your State Legislator . . .
Contacting Your Federal Legislator . . .
Connecticut Maps . . .
State Unclaimed Property
How Do I Contact . . .
Where Can I Find . . .

How Do I Contact . . .

Finding People: Contacts for State Agencies

The Connecticut Department of Administrative Services maintains an alphabetic listing of Connecticut State agencies and their general contacts and phone numbers on a web page at: http://www.state.ct.us/phone/dept.htm.

- The Governor's Office
- The Lieutenant Governor's Office
- The Secretary of State
- The State Comptroller
- State Employees
- The State Treasurer

- The Attorney General
- DEP for Oil and Chemical Spills

Where Can I Find . . .

- Connecticut Constitution and other Historical Information & Documents
- Connecticut State Statutes
- Connecticut Income Tax Forms
- Connecticut Lotto Drawings
- Connecticut Department of Motor Vehicles
- Job/State Employment

- Boating
- Camping
- Child Support Delinquents, Wanted Posters for
- Docks and Beach Erosion Information
- Fishing Guide
- Hunting and Trapping Guide
- Sex Offender Registry
- State Bar Examination Results
- State Parks and Forests
- State Purchasing/Procurement

http://www.state.ct.us/faqs.htm

Can't Find It? . . .

If you can't find what you are looking for . . . Please **E-mail** the Connecticut State Library at their E-mail address: isref@cslib.org

Detailed Answers for Items Above . . .

Sex Offender Registry

- The Connecticut Department of Public Safety is responsible for the Sexual Offender Registry Website.

The Sexual Offender Registry can be accessed from the Department of Public Safety home page or directly at the following address: http://www.state.ct.us/dps/Sor.htm

Purchasing/Procurement

- The Connecticut Department of Administrative Services (DAS) provides procurement services on behalf of all state agencies for all general service and commodity areas. Please direct your specific question to the DAS webmaster **E-mail**: das.webmaster@po.state.ct.us. For a complete listing of current business opportunities with the State of Connecticut, please see the Business Opportunity web page on their site at http://www.das.state.ct.us/busopp.htm.

- The Connecticut Department of Information Technology (DOIT) provides procurement services relating to telecommunications systems and services, computer hardware and software, media, supplies and related contractual services. For a complete listing of current IT Purchasing opportunities, Contract Awards and Sealed Bid and Proposal Notices with the State of Connecticut, please see the DOIT IT Purchasing web page on their site at http://www.doit.state.ct.us/Purchasing/purchasing.htm.

Relocation to Connecticut

Useful Town-Based Information . . .

The **ConneCT** Municipality Websites page, is a comprehensive listing of all current websites available for the **169 towns and cities in Connecticut**.

The Department of Economic and Community Development maintains a web page for Connecticut Town Profiles. Each town profile has sections on **demographics, economics, education, local government, housing, labor force, and quality of life**, more than 200 statistics in total. Up to five profiles are available at no charge. Please see the web page: http://www.state.ct.us/ecd/research/townprof/index.html

The Office of Policy and Management maintains, a list of municipal data resources and databases including **mill rates by town** and a compendium of Municipal Fiscal Indicators. Please see the web page: http://www.opm.state.ct.us/database.htm. Current **population statistics** for each of Connecticut's 169 towns is also available at: http://www.opm.state.ct.us/pdpd3/data/estimate.htm. The US Census Bureau's U.S. Gazetteer website at: http://www.census.gov/cgi-bin/gazetteer, can also provide an extraordinary amount of census data for particular Connecticut towns.

Useful Education/School Based Information . . .

The Connecticut State Department of Education (SDE), is a useful **starting place for K-12 Education**/School Based Information. SDE maintains a web page for accessing Strategic School Profiles, a town-by-town, school-by-school assessment based a standard set of categories. Connecticut Education Facts are also available on this site.

For information on **Connecticut's Institutions of Higher Education** and other post

secondary educational opportunities, the Connecticut Department of Higher Education a [sic] is a useful starting place: http://ctdhe.commnet.edu/dheweb/toc.htm

Useful Housing/Real Estate Based Information . . .

The Connecticut Association of Realtors (which is not a state government organization) maintains a website known as The Connecticut Living Network at: http://ct.living.net/ – a comprehensive source for REALTORS® and homes in Connecticut

Tax Forms Request

The Connecticut Department of Revenue Services maintains a website at http://www.state.ct.us/drs/index.html. When viewing the home page, look to the left frame and click on FORMS to take you to the section of their web for downloading State of Connecticut Tax forms. For links to other states tax sites, look to the left frame and click on OTHER TAX SITES and follow the links to State Tax Departments and, ultimately, the state of your choice.

Finding a Job/State Employment

There are two Connecticut State Agencies that can help you with your job search.

- The Connecticut Department of Labor maintains a website at http://www.ctdol.state.ct.us/. Within that website they maintain a page for Employment Services: http://www.ctdol.state.ct.us/progsupt/jobsrvce/ emplser.htm. That page contains links to Search for Work (including America's

Talent Bank, Connecticut's Job Bank, & America's Job Bank) -Tips on Finding Jobs -Programs and Services -Links to Related Information. For additional questions and information, please **E-mail** the DOL webmaster at dol.help@po.state.ct.us

- The Connecticut Department of Administrative Services (DAS) administers employment services for Connecticut State government. DAS has a web page for State Employment Opportunities, which includes State Job Examination Announcements, job opportunities at the University of Connecticut, and job opportunities at the University of Connecticut Health Center, at http://www.das.state.ct.us/public.htm. They also maintain another page on their website for state agencies that is another good source of state employment information at http://www.das.state.ct.us/osaopp.htm. Information includes Promotional Exams, Open Competitive Exams, Examination Information and Application Forms for State Employment. Further information can be found at http://www.das.state.ct.us/HR/HRhome.htm. For additional questions and information about state government employment, please **E-mail** the DAS webmaster at das.webmaster@po.state.ct.us

Facts and Information about Connecticut

- Connecticut residents may be familiar with the annual publication available in most Connecticut libraries known as the "Blue Book" or its official title the Connecticut State Register and Manual. This book contains a section known as **"Selected Facts About Connecticut"**, which contains some not so known facts about Connecticut.

- The **ConneCT** About Connecticut page contains facts and other links to interesting information about Connecticut.
- The **Tourism** Special Events page also offers links to interesting information about Connecticut.
- The Connecticut Economic Resource Center (CERC) website also has a good web page for Connecticut facts including, a section called Surprising Facts About Connecticut. Please see: http://www.cerc.com/cerc/cercweb.nsf/pages/About Connecticut.html
- The ConneCT Historical Information & Document page at http://www.comb.org/hid/index.htm also contains a section known as Selected Dates in Connecticut's History, which may be of interest as well.
- Also, the Connecticut State Liberty maintains a general reference **e-mail address** at: isref@cslib.org. Please direct your question to this e-mail address.

Opening a Business in the State of Connecticut

The following sites contain information pertaining to opening a business in the State of Connecticut.

Need information and Help?

- The *Connecticut Economic Resource Center* (CERC) is funded by the state and by private industry and is business's **central point of contact** for all of the state agencies and organizations involved in economic development.

- The Connecticut *Department of Economic and Community Development* (DECD) is the state's lead agency for economic development and housing development. **E-Mail**: DECD@po.state.ct.us The DECD *Help with Starting a Business* page includes links to **Smart Start**, a gateway to business registration in Connecticut; **Starting A Business**, a 24 page brochure which answers frequently asked questions about starting a business in Connecticut, and **Help is Here**, a 20 page brochure is your guide to what Connecticut offers businesses.

- In addition, the "Commerce" page on the ConneCT website contains information about agencies and organizations within the State of Connecticut ready to assist businesses and individuals in support of the state's economic development as well as additional information about Connecticut's economy, markets, and labor force: http://www.state.ct.us/commerce.htm. **E-Mail**: todd.bentsen@po.state.ct.us

- The Connecticut *Small Business Development Centers* provides confidential, **one-on-one business counseling** services to small business owners throughout the state. The focus is on helping small business owners and those considering starting a small business to develop the skills required to successfully run a business and thrive. All business services are provided for free.

Need to License, Register or Incorporate Your Business?

- The *Connecticut Licensing Info Center* Website (CLIC) offers direct, on-line access to most **licensing and permitting** requirements within Connecticut State government. It's a searchable website

with access to detailed information on 900 licenses, permits and registrations and includes links to downloadable forms from most of 25 licensing and permitting agencies. **E-Mail**: dennis.mcneil@po.state.ct.us

- For **incorporating a business** in the State of Connecticut contact the *Commercial Recording Division* of the Secretary of the State's Office. **E-Mail**: peter.bartucca@po.state.ct.us

- To obtain a **Tax Number**, etc. for doing business in the State contact the Connecticut *Department of Revenue Services* (see "Starting a Business: In the left hand frame of the Home Page) **E-Mail**: webmaster.drs@po.state.ct.us

Need Financing?

- The *Connecticut Development Authority* (DCA) will provide **creative financial solutions** for businesses that encourage economic and employment growth, job training and business recruitment. In addition, the CDA provides direct loans to businesses when companies significantly expand or relocate to Connecticut or when private lenders are unable to address the total needs of the business.

- *Connecticut Innovations* is the State of Connecticut's **technology** development corporation. Connecticut Innovation invests in emerging Connecticut technology companies that are the building blocks of a dynamic, competitive economy. Connecticut Innovations provides the risk capital companies need to develop, market and launch new products and services. Connecticut Innovations also fosters the transfer of laboratory research into commercial applications for the next generation of enterprises.

Need a Building?

- SiteFinder, developed by the Connecticut Economic Resource Center (CERC), is Connecticut's most comprehensive source of available commercial and industrial real estate properties. SiteFinder @ http://www.cerc.com/sitefindernew.html, allows users of the World Wide Web to perform simple searches for available commercial real estate. Searches can be performed to find available buildings as well as sites. Also, searches can be performed based on building or site type (commercial, industrial, office, etc.), building or site size, location (city, county or statewide), and other factors.

Contacting State Your [sic] **Legislator**

You can find contact information about your state legislator, depending upon his or her political affiliation and/or elected office, via the following web pages:

House

- The Connecticut House Republications maintain a web page listing contact information for their members. The address is: http://www.housegop.state.ct.us/contact.htm
- The Connecticut House Democrats maintain a web page listing contact information for their members. The "alpha" list of members is located at: http://www.cga.state.ct.us/hdo/repsalpha.htm. The Representative List Sorted by Town is located at: http://www.cga.state.ct.us/hdo/repbytown.htm

Senate

- For a list of Web Pages for each Senator: http://www.cga.state.ct.us/members/slist.htm
- The Connecticut Senate Democrats maintain a web page listing contact information for their members. The "alpha" list of members is located at: http://www.senatedems.state.ct.us/info.html. Finding a Democratic Senator by the Town you live in: http://www.senatedems.state.ct.us/Towns.html.
- The Connecticut Senate Republicans maintain a web page listing contact information for their members. The "alpha" list of members is located at: http://www.senatereps.state.ct.us/contact.htm

Contacting Your Federal Legislator

- Hyperlinks to Connecticut U.S. Congressional Members are available at the following web page: http://www.das.state.ct.us/Home/US House Members.htm
- Hyperlinks to Connecticut U.S. Senators are available at the following web page: http://www.das.state.ct.us/Home/US Senate Members.htm

Maps

- Both the Connecticut Department of Transportation http://www.state.ct.us/dot/pub/maps.html and the University of Connecticut http://magic.lib.uconn.edu/ provide online access to extensive libraries of digital maps. However, the majority of these maps require Geographical Information System applications software to access, view, manipulate and print them.

- The Department of Economic and Community Development also maintains a Connecticut Map/ GIS data page on their web site at: http://www.state.ct.us/ecd/research/maps/index.html. Their maps are available in either image file formats (*.GIF or *.JPG) or download document formats such as PDF (Portable Document Format) and EPS (encapsulated PostScript file).
- You may also want to visit/contact the DEP Store: The Maps and Publications Office of the Natural Resources Center provide by the Connecticut Department of Environmental Protection. Please see their web page at: http://dep.state.ct.us/cgnhs/store.htm.

Unclaimed Property

Unclaimed property is a function of the Connecticut *Office of the State Treasurer*. For unclaimed property claims, please see their web page at http://www.state.ct.us/ott/ ucp.htm. For additional information, you can **E-mail** the Unclaimed Property Unit: unclaimed.property@po.state. ct.us. For inquiries regarding a claim **please include** the following information in your E-mail: **Name, Current Address, and Phone Number of claimant.**

Child Support Delinquents, Wanted Posters for

There are actually two pages, one produced by the *State Attorney General's office* and the other by the *Department of Social Services*.

State Employees

The *Department of Administrative Services* maintains a *State Employee* Directory which is

currently Connecticut's best single tool on the 'Web'. The limitations of this directory is that it currently does not include all State Employees at this time.

The State of Connecticut is in the process of implementing a statewide Email/directory project using X.500 technology. As an interim solution, the *Directory* Page of the Connecticut Website is intended to provide users with a single point of access to all the state directories available.

Oil and Chemical Spills

The Department of Environmental Protection will assist you with any reporting of Oil or Chemical Spills Telephone: (860) 424-3333 Fax: (860) 424-4069

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[LOGO] State of Connecticut
DEPARTMENT OF PUBLIC SAFETY
[Picture Omitted In Printing]

Dr. Henry C. Lee
Commissioner

MISSION

The Department of Public Safety provides a coordinated, integrated program for the protection of life and property within this state. The Department of Public Safety is charged to prevent crime, apprehend criminals, enforce motor vehicle laws, investigate crimes and traffic accidents and perform other regulatory and safety functions to benefit all citizens of this and other states. The department also provides fire/building services; oversees emergency management and statewide emergency telecommunications; reviews/enforces the state building and fire codes; trains and certifies local building and fire officials to safeguard the lives and property of the citizens of this state and those who work and travel within its borders.

DIVISION OF STATE POLICE [LOGO]

DIVISION OF FIRE, EMERENCY & BUILDING SERVICES [LOGO]

SEX OFFENDER REGISTRY	HEADING TOWARD A HUNDRED
FAQ'S	UNIFORM CRIME REPORT

CSP Needs Your Help

Go To **Conne** the official State of Connecticut Website

Please send comments to:
DPS. Feedback@po.state.ct.us

This page last updated on: Monday, May 24, 1999

[LOGO] Connecticut Department of Public Safety
Sex Offender Registry

- **Search Database for Offenders**

PA98-111 (Connecticut General Statutes §§54-250 through 54-229)-mandates that the Connecticut Department of Public Safety establish and maintain a central registry of persons who are required to register under sections 54-250 through 54-254 of the general statutes. This website makes available to the public registry information.

IMPORTANT REMINDERS

Positive identification of persons believed to be subject to the registration requirements cannot be established unless a fingerprint comparison is made. *PA98-170* authorizes the *Department of Public Safety* to release, to any person, a state criminal conviction record for fee of $25.00. For more information, contact the *Department of Public Safety*, State Bureau of Identification (SPBI) at (860) 685-8480.

The Department of Public Safety updates this information regularly, to try to assure that it is complete and accurate. However, this information can change quickly. You are cautioned that the information provided on this site is information of record and may not reflect the current residence, status, or other information regarding a registrant (offender). Offenders who were conditionally discharged prior to October 1, 1988, are not required to register. The registry contains no information about such persons. Offenders convicted or found not guilty by reason of mental disease or defect of certain offenses specified under *PA 98-111* and released to the community after October 1, 1988, must register. *PA 98-111* also specifies that registrations be expanded to include an additional number of offenders convicted or found not guilty by reason of mental disease or defect of certain offenses when released to the community after October 1, 1998.

Persons who have been arrested or charged with a sex offense listed in PA 98-111 are not required to register unless the arrest or charge results in a conviction or a finding of not guilty by reason of mental disease or defect. This list contains only offenders who have been convicted or found not guilty by reason of mental disease or defect.

If you believe that any of the information found in these records is in error, please contact the ***Connecticut Department of Public Safety, Division of State Police Sex Offender Registry Unit*** at *P.O. Box 2794 Middletown, CT 06457 Phone (860) 685-8060*. This information is made available for the purpose of complying with Connecticut General Statutes § 54-250, *et seq.* which requires the Connecticut Department of Public Safety to establish and maintain a registry of persons who are required to register under sections 54-250 through 54-254 of the

General Statutes. Those statutes require that certain individuals be included in the registry because of their conviction or finding of not guilty by reason of mental disease or defect of a specified criminal offense and subsequent release into the community on or after October 1, 1988. The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the Registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual. Anyone who uses this information to injure, harass, or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.

Please see Section 54-250 of the Connecticut General Statutes and the Connecticut Penal Code at Sections ***53a-4 et al.,*** for specific language pertaining to these offenses resulting in the requirement that someone register.

sex.offender.registry@po.state.ct.us

Due to the large volume of messages received at this time, we are unable to respond to each one individually. However, if you have given information regarding a sex offender it will be verified and processed. If you have offered your opinion on the issue of sex offender registration it has

been read and considered. If you are a sex offender and are inquiring whether you need to register or not, please send your full name and date of birth so that this can be verified. We appreciate your interest in this matter. Sgt. Kathleen A. Miller.

MSNBC

TUESDAY LOCAL NEWS
June 29, 1999

Man accused of murdering Bristol priest appears in court

32-year-old Michael Ouellette was in court Monday in connection with murder charges in the death of Reverend Robert Lysz. Ouellette is being held on a $1 million bond and will be back in court July 13th.

• DAILY NEWS SUMMARY COMPLETE STORY ▶

Today's Headlines

- Accused priest killer placed ad in local paper on day of murder
- Community comes together to remember slain priest
- Water agency issues mandatory outdoor water ban
- Officials asking people to cut back power usage
- President Clinton visits Connecticut for luncheon
- Prosecutors' hopes rest with tissue sample from 1973 murder mystery
- Hartford City Council votes to take action regarding insurance rates
- Racial profiling bill signed into law
- Deal reached between Colonial Realty and investors
- Police say New Haven crime rate is down
- Boy dies after car struck and killed him
- Top state students choosing UConn over other schools
- Powerball jackpot reaches $130 million
- Albanian-Americans in Connecticut react to peace deal
- Milford church gathers goods to help Kosovar refugees
- Monroe businessman reunited with Albanian refugee sister, family
- Waterbury prepares to host 1,000 refugees
- Refugee family finds relatives in Connecticut
- Waterbury holds biggest fund-raiser yet for Kosovo refugees
- Austin Powers doll may be tc indy for some shoppers
- State, federal agencies clamp down on talent scout
- NBC 30, state police join forces to "Stop the Violence" in schools
- "Megan's Law" list hits the Web
- An easy way to track your congressman or senator
- NBC 30 BUSINESS NEWS: Connecticut's Top 30 Stocks
- NBC 30 Connecticut News invites you to visit our online news, weather and sports forum

Talcott Mountain Music Festival '99
Summer Concert Series: The Hartford Symphony Orchestra
(click here for more info)

U.S.Naval Observatory Master Clock
12:16:52
Eastern Time
(refresh to update)

CONNECTICUT'S TOP 30 STOCKS

Click above for updated quotes throughout the business day.

MSNBC Marketwatch

(quote info on 20 minute delay)

TODAY'S HOT LINKS

Click above to see a list of Web sites mentioned during our newscasts.

- Ozone Alert: Keep track of local and regional smog levels.
- Pollen Count: Concerned about seasonal allergies? Here's where to get updated information.
- Family Search: The online genealogy database recently launched by the Mormon Church.
- Cancer Trials: Two Web sites where you can get information about STAR, the Study of Tamoxifen and Raloxifene.
- Meagan's List: The Connecticut State Police sex offender registry Web site.

TODAY'S RECIPES

Click above for the recipes featured on "NBC 30 Connecticut News Today Weekend"

SPECIAL PROJECTS

Click above for the latest news and analysis from MSNBC.

STOP the VIOLENCE before it starts.

Click above for information about our partnership with state and local police.

WHAT'S ON TV

- Right Now
- Next at 1pm
- Then at 2p
- Program

FAVORITE

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- Games
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NEWS 8 CHANNEL

ONLINE

Voted 'Best Sportscast in Connecticut' by the Associated Press

June 29 / 8:30 am

ABCNews.com

Take a ride on Chopper 8 Live

CNN Interactive

House of News
Notes from the News Director

NEWS UPDATE:
Power Warning Issued
Police not close to an arrest in Jovin case.
Boy struck by car dies
Judge approves Colonial Realty settlement
Mural raising eyebrows in New London
AAA predicts record volume for Fourth of July
Mystic caring for two beached whales.
FIREWORKS: See where the rockets red glare are bursting in air this year.

▸ State Sex Offender Database

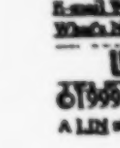
TEAM 8 INVESTIGATES:
▸ Foxwoods Field Trip
Bad Bridges

CONSUMER TEAM 8:
Digital phone service snafus
Weekend Internet Airfares
Cheap Eats
Help Me Anna

Yale-New Haven Hospital www.ynhh.org

HEALTH TEAM 8:
Lead Poisoning Leads to Tooth Decay
Red Cross blood donation locations

ALL ABOUT WOMEN:
Painter Liz Bermel



How do you pick your favorite stories from more than 600 reported over more than a dozen years? It's impossible, but there are a few Diane wanted to share one more time in this last Positively Connecticut report on News Channel 8.

COUNTDOWN 2000:
Countdown the days, hours and seconds to 2000

PET OF THE WEEK:
Animal Shelt[illegible] across Connecticut

cool STUFF

Connecticut has many museums, big and small, with a wide variety of attractions. Find out about some of them in this week's Cool Stuff from the Web.

Only Online: PC Expo shows the world the latest and greatest in computer gear

PROMOTIONS

BEAT THE PRO
Can you Beat the Pro? Find out how to try.

WPLR / News Channel 8 "Wheel of Fortune" giveaway.

Weather Camp 8
See what the fun is all about at Weather Camp '99.
Click on the picture for details.

8 INTERACTIVE

Have a comment to make about what's happening in Connecticut and the world?

Check out our 8 Interactive Question of the Day

INSIDE 8

News Channel 8 wins 6 Emmy Awards

News Channel 8 wins top Sports, Videography honors at 1998 Associated Press Awards.

News Channel 8 goes DIGITAL!

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOHN DOE,	: CIVIL NO.
Plaintiff,	: 3:99CV0314(RNC)
	:
v.	:
	:
DR. HENRY LEE, ET AL,	: JULY 23, 1999
Defendants.	:

ANSWER AND AFFIRMATIVE DEFENSES TO THIRD AMENDED COMPLAINT

As to the Answer:

1. As to Paragraph 1, the defendants deny that this action is brought on behalf of any persons other than the plaintiff. As to the remainder of this Paragraph, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

2. Paragraph 2 is denied.

3. As to Paragraph 3, the defendants admit that registration is required on the basis of a conviction or finding of not guilty by reason of insanity for one of the offenses listed in the statute and release into the community during the time periods specified in the statute. The remainder of this Paragraph is denied.

4-6. As to Paragraphs 4-6, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

7-8. Paragraphs 7 and 8 are admitted.

9. As Conn. Gen. Stat. §§ 54-257(a) and 54-258(a)(1) are statutory provisions, the defendants neither admit nor deny their content.

10-11. Paragraphs 10 and 11 are admitted.

12. As Conn. Gen. Stat. § 18-81 is a statutory provision, the defendants neither admit nor deny its content.

13. As Conn. Gen. Stat. § 54-256 is a statutory provision, the defendants neither admit nor deny its content.

14. Paragraph 14 is admitted.

15. Paragraph 15 is denied.

16-17. As to Paragraphs 16-17, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

18. Paragraph 18 is admitted.

19-22. Paragraphs 19-22 are denied.

23. As to Paragraph 23, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

24-26. Paragraphs 24-26 are denied.

27. As Conn. Gen. Stat. §§ 54-250 *et seq.* are statutory provisions, the defendants neither admit nor deny their content.

28. As Conn. Gen. Stat. §§ 54-251(a), 54-252(a), 54-252(b), and 54-253(a) are statutory provisions, the defendants neither admit nor deny their content.

29. As Conn. Gen. Stat. §§ 54-250(3), 54-251(a), 54-252(a), 54-252(b), and 54-253(a) are statutory provisions, the defendants neither admit nor deny their content.

30. Paragraphs 30-31 are admitted.

32-35. As to Paragraphs 32-35, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

36. As Conn. Gen. Stat. § 54-251(a) is a statutory provision, the defendants neither admit nor deny its content.

37. As Conn. Gen. Stat. § 54-251(a) is a statutory provision, the defendants neither admit nor deny its content.

38. As Conn. Gen. Stat. § 54-252(a) is a statutory provision, the defendants neither admit nor deny its content.

39. As Conn. Gen. Stat. §§ 54-251(b)-(c) and 54-252(a) are statutory provisions, the defendants neither admit nor deny their content.

40. As Conn. Gen. Stat. § 54-21(b)-(c) are statutory provisions, the defendants neither admit nor deny their content.

41. As Conn. Gen. Stat. § 54-250(3)(a) is a statutory provision, the defendants neither admit nor deny its content.

42. As Conn. Gen. Stat. §§ 54-251(d) and 54-252(d) and 54-253(d) are statutory provisions, the defendants neither admit nor deny their content.

43. As to Paragraph 43, it is admitted that the Department of Public Safety acts in accordance with the provisions of Conn. Gen. Stat. § 54-102g(d).

44. As to Paragraph 44, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

45. As to Paragraph 45, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

46. As Conn. Gen. Stat. §§ 54-250 *et seq.* are statutory provisions, the defendants neither admit nor deny their content.

47. As Conn. Gen. Stat. §§ 54-251(d) and 54-252(d) and 54-253(c) are statutory provisions, the defendants neither admit nor deny their content.

48. As Conn. Gen. Stat. § 54-257(b)-(c) are statutory provisions, the defendants neither admit nor deny their content.

49. As Conn. Gen. Stat. § 54-257(c) is a statutory provision, the defendants neither admit nor deny its content.

50. As Conn. Gen. Stat. § 54-257(c) is a statutory provision, the defendants neither admit nor deny its content.

51. As Conn. Gen. Stat. § 54-257(c) is a statutory provision, the defendants neither admit nor deny its content.

52. As Conn. Gen. Stat. §§ 54-251(a) and 54-252(a) are statutory provisions, the defendants neither admit nor deny their content.

53. As Conn. Gen. Stat. §§ 54-251(d) and 54-252(d) and 54-253(c) are statutory provisions, the defendants neither admit nor deny their content.

54-56. As to Paragraphs 54-56, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

57. As Conn. Gen. Stat. § 54-257(c) is a statutory provision, the defendants neither admit nor deny its content.

58. As Conn. Gen. Stat. § 54-258(a)(1) is a statutory provision, the defendants neither admit nor deny its content.

59. As Conn. Gen. Stat. § 54-258(a)(1) is a statutory provision, the defendants neither admit nor deny its content.

60. As Conn. Gen. Stat. § 54-258(a)(1) is a statutory provision, the defendants neither admit nor deny its content.

61. Paragraph 61 is admitted.

62. As Conn. Gen. Stat. § 54-255(a)-(b) are statutory provisions, the defendants neither admit nor deny their content.

63. As Conn. Gen. Stat. §§ 54-255(a)-(c) are statutory provisions, the defendants neither admit nor deny their content.

64. As Conn. Gen. Stat. § 54-255(c) is a statutory provision, the defendants neither admit nor deny its content.

65. As Conn. Gen. Stat. §§ 54-255(c)(1), 54-255(c)(2), 54-255(c)(3), 54-255(c)(4), and 54-255(c)(5) are statutory provisions, the defendants neither admit nor deny their content.

66. As Conn. Gen. Stat. § 54-255(c) is a statutory provision, the defendants neither admit nor deny its content.

67. As to Paragraph 67, as it is assumed that the reference to "The statute" refers to Conn. Gen. Stat. § 54-255(c) which is referenced in the preceding Paragraph, and even if it is not, since this Paragraph seems to paraphrase a statutory provision, the defendants neither admit nor deny its content.

68. As to Paragraph 68, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

69. As Conn. Gen. Stat. § 54-257(a) is a statutory provision, the defendants neither admit nor deny its content.

70. As Conn. Gen. Stat. § 54-258(a)(2) is a statutory provision, the defendants neither admit nor deny its content.

71. As Conn. Gen. Stat. §§ 54-250 *et seq.* are statutory provisions, the defendants neither admit nor deny their content.

72. As to Paragraph 72, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

73. As to Paragraph 73, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

74. As to Paragraph 74, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

75. Paragraph 75 is denied.

76. Paragraph 76 is denied.

77. Paragraph 77 is denied.

78. Paragraph 78 is denied.

79. Paragraph 79 is denied.

80. The responses to Paragraphs 1 through 79 are adopted and reincorporated as if fully set forth herein.

81. As to Paragraph 81, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

82. As to Paragraph 82, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

83. Paragraph 83 is denied.

84. Paragraph 84 is denied.

85. The responses to Paragraphs 1 through 84 are adopted and reincorporated as if fully set forth herein.

86. As to Paragraph 86, the defendants are without sufficient information upon which to form a belief, and therefore leave the plaintiff to his proof.

87. Paragraph 87 is denied.

88. Paragraph 88 is denied.

89. Paragraph 89 is denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense:

The plaintiff in this matter has failed to state a claim upon which injunctive, declaratory, or any other relief can be granted.

Second Affirmative Defense:

This Court lacks subject matter jurisdiction over this matter pursuant to the *Younger* abstention doctrine.

DEFENDANTS
Dr. Henry C. Lee, et al,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

BY: /s/ Margaret Q. Chapple
Margaret Q. Chapple
Assistant Attorney General
Federal Bar No. ct05550

BY: /s/ Lynn D. Wittenbrink
Lynn D. Wittenbrink
Assistant Attorney General
Federal Bar No. ct08575
110 Sherman Street
Hartford, CT 06105
Tel.: (860) 808-5450

CERTIFICATION

I hereby certify that a copy hereof was mailed this 23rd day of July, 1999, first class postage prepaid, to:

Ann Parrent
Connecticut Civil Liberties Union
32 Grand Street
Hartford, CT 06106

/s/ Lynn D. Wittenbrink
Lynn D. Wittenbrink
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE
Plaintiff,

CIVIL ACTION NO.
3:99CV0314(RNC)

VS.

DR. HENRY LEE, ET AL.
Defendants

SEPTEMBER 13,1999

LOCAL RULE 9(C)2 STATEMENT
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

A. Response to Plaintiff's Local Rule 9(c)1 Statement

1. Admitted

2. Admitted

3. It is admitted that as Commissioner of Public Safety, the defendant Commissioner Lee has certain responsibilities in connection with Public Act 98-111, as amended by Public Act 99-183. As the plaintiff alleges that those responsibilities are set forth in As Conn. Gen. Stat. §§ 54-250 *et seq*, and as Conn. Gen. Stat. §§ 54-150 *et seq* are statutory provisions, the defendants neither admit nor deny their content.

4. Admitted

5. Admitted

6. Admitted.

7. As the plaintiff alleges that the defendant Commissioner Armstrong has responsibilities in connection with registration of persons pursuant to As Conn. Gen. Stat. §§ 54-250 *et seq*, and as §§ 54-250 *et seq* are statutory

provisions, the defendants neither admit nor deny their content.

8. Admitted

9. Admitted

10. Admitted.

11. Admitted

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted

17. Admitted

18. Admitted.

19. Admitted.

20. It is admitted that Exhibit F provides a true and complete copy of the text of the Department of Public Safety Sex Offender Registry website along with a copy of the State of Connecticut Department of Public Safety website.

21. It is admitted that Exhibit G provides a true and complete copy of the text of the Department of Public Safety Sex Offender Registry website beginning in approximately late March, 1999, along with a copy of the State of Connecticut Department of Public Safety website.

22. Admitted.

23. Admitted.

24. Admitted

25. Admitted.

26. Admitted.

27. Admitted.

28. Admitted.

29. Admitted.

30. Denied.

31. Admitted.

32. Admitted.

B. Material Facts as to Which there is a Genuine Issue to Be Tried

1. A genuine issue of material fact exists as to whether or not the plaintiff has suffered an adverse consequence as a result of his name and criminal history information being made available Connecticut's Department of Public Safety website that is maintained in accordance with Public Act No. 98-111 as modified by Public Act 99-183.

2. A genuine issue of material fact exists as to the proximate cause of any ill effects the plaintiff claims to have suffered as a result of his name and criminal history information being made available Connecticut's Department of Public Safety website that is maintained in

accordance with Public Act No. 98-111 as modified by Public Act 99-183.

DEFENDANTS,
Dr. Henry C. Lee, et al.

RICHARD BLUMENTHAL
ATTORNEY GENERAL

BY: /s/ Lynn D. Wittenbrink
Lynn D. Wittenbrink
Assistant Attorney General
Federal Bar No. ct08575
110 Sherman Street
Hartford, CT 06105
Tel.: (860) 808-5450

CERTIFICATION

I hereby certify that a copy hereof was mailed this 13th day of September, 1999, first class postage prepaid, to:

Ann Parrent
Connecticut Civil Liberties Union
32 Grand Street
Hartford, CT 06106

/s/ Lynn D. Wittenbrink
Lynn D. Wittenbrink
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, on behalf of himself and all others similarly situated,	:	CIVIL NO. 3:99CV00314(RNC)
Plaintiffs,	:	
v.	:	November 14, 2000
DR. HENRY C. LEE, in his official capacity as Commissioner of Public Safety; WILLIAM CARBONE, in his official capacity as Director of the Office of Adult Probation and Director of the Court Support Services Division of the Judicial Department; and JOHN ARMSTRONG, in his official capacity as Commissioner of Correction,	:	
Defendants.	:	

PROPOSED FOURTH AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This action is brought by plaintiff John Doe, on behalf of himself and all others similarly situated, to challenge the constitutionality of the Connecticut law requiring the registration and public disclosure of information concerning persons designated as "sex offenders."

2. The statutory registration and disclosure law, codified at Conn. Gen. Stat. §§ 54-250 *et seq.*, designates persons convicted of certain specified offenses as "sexual offenders" who must register with the Department of Public Safety and provide certain identifying information.

3. In the name of public safety, the law provides for widespread public dissemination of information regarding persons designated as "sex offenders," including the publication of a physical description, photograph and current residence address on the internet. This system suggests to the public that Connecticut law enforcement officials have made a determination that persons designated as "sex offenders" pose a threat to the safety of the community. However, registration is required solely on the basis of a conviction for one of the offenses listed in the statute. Widespread dissemination of a person's designation as a "sex offender" and his identifying information occur without any assessment of whether the person in fact poses any danger to the community. As a result, persons designated as "sex offenders" are unfairly stigmatized and threatened with ostracism, threats to personal safety, loss of employment and housing opportunities, and other adverse consequences resulting from the public perception that they are currently dangerous sex offenders who pose a threat to the safety of the community.

4. John Doe is not a dangerous sexual offender and does not pose a threat of safety to the community.

5. This action seeks a declaratory judgment holding that the statutory registration and public disclosure scheme is unconstitutional and an injunction prohibiting its further enforcement on the ground that it deprives the plaintiff and the class members he seeks to represent of their rights as guaranteed by the Due Process Clause of

the Fourteenth Amendment to the United States Constitution and the Ex Post Facto Clause of the United States Constitution.

JURISDICTION AND VENUE

6. This action arises under 42 U.S.C. § 1983 and the Ex Post Facto Clause, Article I, Section 10, of the United States Constitution and the Fourteenth Amendment to the United States Constitution. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(4). Jurisdiction to grant a declaratory judgment is conferred by 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper in this district under 28 U.S.C. § 1391.

PARTIES

Plaintiff

8. Plaintiff John Doe is a resident of the State of Connecticut who has been convicted of an offense that requires registration as a sexual offender pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* John Doe is a pseudonym that is being used in this case to protect the true identity of the plaintiff from public disclosure.

Defendants

9. Defendant Dr. Henry C. Lee is and has been the Commissioner of Public Safety since approximately June 1998. Defendant Lee is sued in his official capacity.

10. Pursuant to Conn. Gen. Stat. §§ 54-257(a) and 54-258(a)(1), the Department of Public Safety is responsible for establishing, maintaining and making publicly available a registry of all persons required to register as "sexual offenders."

11. Defendant William Carbone is and has been the Executive Director of the Court Support Services Division of the Judicial Department since September 25, 1998. Since April 2, 1999, defendant Carbone has held the position of Director of the Office of Adult Probation. As Director of the Office of Adult Probation, defendant Carbone's responsibilities are set forth in Conn. Gen. Stat. § 54-105. Defendant Carbone is sued in his official capacity.

12. Defendant John Armstrong is and has been the Commissioner of Correction since approximately January 1995. Defendant Armstrong is sued in his official capacity.

13. Pursuant to Conn. Gen. Stat. § 18-81, defendant Armstrong is responsible for the overall supervision and direction of all institutions, facilities and activities of the Department of Correction.

14. Pursuant to Conn. Gen. Stat. § 54-256, defendant Armstrong is responsible for requiring persons to register as required under Conn. Gen. Stat. §§ 54-250 *et seq.* prior to their release into the community.

15. At all times relevant hereto, the defendants acted under color of state law in connection with their enforcement of Conn. Gen. Stat. §§ 54-250 *et seq.*

CLASS ACTION ALLEGATIONS

16. The named plaintiff brings this action pursuant to Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of himself and all other persons similarly situated.

17. Plaintiff is a member of and seeks to represent two classes consisting of (1) all persons who are subject to the registration requirements of Conn. Gen. Stat. §§ 54-250 *et seq.* (the "due process class") and (2) all persons who are subject to the registration requirement of Conn. Gen. Stat. §§ 54-250 *et seq.* and whose convictions arise out of conduct that occurred prior to the effective date of the provisions requiring their registration and/or public dissemination of identifying information concerning them (the "ex post facto class").

18. The due process class is so numerous that joinder of all members is impracticable.

19. Upon information and belief, over 1,900 persons are currently subject to the registration requirements of Conn. Gen. Stat. §§ 54-250 *et seq.*

20. There are questions of law and fact common to the due process class, including the following:

a. Whether the members of the class have constitutionally protected liberty interests in not being designated as currently dangerous sexual offenders who pose a threat to public safety; and

b. Whether the conduct of the defendants has deprived members of the class of their liberty interests without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

21. The claims of the named plaintiff are typical of the claims of the members of the due process class in that the constitutional deprivation caused by the conduct of the defendants is the same for the named plaintiff and all other members of the class.

22. The named plaintiff will fairly and adequately represent the interests of the members of the due process class.

23. The ex post facto class is so numerous that joinder of all members is impracticable.

24. Upon information and belief, most of the persons required to register under Conn. Gen. Stat. §§ 54-250 *et seq.* must register based on convictions arising out of conduct that occurred prior to the effective date of the applicable registration and/or public disclosure provisions.

25. There are questions of law and fact common to the ex post facto class, including the following:

a. Whether the registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* retroactively impose punishment within the meaning of the Ex Post Facto Clause;

b. Whether the burdens associated with the registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* are imposed for the purposes of punishment; and

c. Whether the registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* are punitive in fact.

26. The claims of the named plaintiff are typical of the claims of the members of the ex post facto class in that the constitutional deprivation caused by the conduct of the

defendants is the same for the named plaintiff and all other members of the class.

27. The defendants have acted on grounds generally applicable to all members of both classes, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

STATEMENT OF FACTS

A. Designation of Persons As Sex Offenders.

28. Persons convicted of certain specified offenses are designated as "sexual offenders" who must register with the Department of Public Safety. Conn. Gen. Stat. §§ 54-250 *et seq.*

29. Registration as a "sexual offender" is required solely on the basis of a conviction for one of the offenses enumerated in the statute. Conn. Gen. Stat. §§ 54-251(a), 54-252(a), 54-252(b), 54-253(a).

30. Persons required to register as sexual offenders are obligated to provide their name, residence address, criminal history record, fingerprints, a photographic image, and a description of such other identifying characteristics as may be required by the Commissioner of Public Safety. Conn. Gen. Stat. §§ 54-250(3), 54-251(a), 54-252(a), 54-252(b), 54-253(a).

31. The Department of Public Safety does not conduct any assessment as to whether or not an individual poses any threat to the safety of the community in order to determine whether or not that person is required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*

32. Upon information and belief, consistent with Conn. Gen. Stat. § 54-1421, the Department of Public Safety has a procedure in place to respond to challenges to the accuracy or completeness of conviction records of persons believed to be subject to the registration requirements pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* Other than that, the Department of Public Safety does not have statutory authority to exercise any discretion in determining whether individuals must register or whether they may be excused from registering pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*

33. The Office of Adult Probation has and continues to require persons subject to its supervision to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*

34. The Office of Adult Probation does not conduct any assessment of persons subject to its supervision regarding any threat an individual poses to the safety of the community in order to determine whether or not a person is subject to the registration requirements of Conn. Gen. Stat. §§ 54-250 *et seq.*

35. The Department of Correction has required and continues to require some of the persons subject to its supervision to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* and 54-102g.

36. The Department of Correction does not conduct any assessment as to whether or not an individual poses any threat to the safety of the community in order to determine whether or not that person is required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*

B. Duration of Sex Offender Registration Requirements.

37. Persons convicted of a single offense defined as a "criminal offense against a victim who is a minor" or a "nonviolent sexual offense" must register for at least ten years. Conn. Gen. Stat. § 54-251(a).

38. Lifetime registration is required for persons convicted of a "criminal offense against a victim who is a minor" or a "nonviolent sexual offense" who have one or more prior convictions for any such offense and for persons convicted of first-degree sexual assault for engaging in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person. Conn. Gen. Stat. § 54-251(a).

39. Lifetime registration is required for persons convicted of any offense defined as a "sexually violent offense." Conn. Gen. Stat. §§ 54-252(a).

40. Lifetime registration is required for persons subject to the registration requirements under earlier versions of the sex offender registration law, except for those who qualify for court-ordered exemption from registration. Conn. Gen. Stat. §§ 54-251(b)-(c), 54-252(a).

41. The only persons who qualify for court-ordered exemption from registration are (1) persons under nineteen years of age at the time of the offense convicted of sexual assault in the second degree for engaging in sexual intercourse with another person and such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person and (2) persons convicted of sexual assault in the

fourth degree for subjecting another person to sexual contact without such other persons' consent. Conn. Gen. Stat. § 54-251(b)-(c).

C. Requirement of Blood Sample for DNA Analysis from Persons Designated as Sex Offenders.

42. Persons required to register as "sexual offenders" are required to submit a blood sample for DNA (deoxyribonucleic acid) analysis, unless such a sample has been previously obtained in accordance with Conn. Gen. Stat. § 54-102g. Conn. Gen. Stat. § 54-250(3).

43. Persons required to register as "sexual offenders" are subject to prosecution for a class D felony if they do not submit to having a blood sample taken for DNA analysis. Conn. Gen. Stat. §§ 54-251(d), 54-252(d), 54-253(c).

44. The Department of Public Safety maintains a databank of DNA characteristics of persons designated as "sexual offenders." Conn. Gen. Stat. § 54-102g(d).

45. Upon information and belief, the Department of Public Safety does not require persons other than those designated as "sexual offenders" to submit to having blood samples taken for inclusion in a databank of identification characteristics of profiles resulting from DNA analysis.

46. Upon information and belief, persons other than those required to register as "sexual offenders" are not subject to felony prosecution for refusing to provide a blood sample to the State of Connecticut for inclusion in a databank of identification characteristics of profiles resulting from DNA analysis.

D. Continuing Legal Obligations of Persons Designated as Sex Offenders.

47. Persons required to register as "sexual offenders" are subject to possible felony prosecution for failure to comply with the legal obligations imposed by Conn. Gen. Stat. §§ 54-250 *et seq.*

48. Failure to comply with the registration provisions subjects persons required to register as "sexual offenders" to possible prosecution for a class D felony. Conn. Gen. Stat. §§ 54-251(d), 54-252(d), 54-253(c).

49. Persons required to register as "sexual offenders" must comply with address verification procedures for their entire registration period, unless registration is suspended by the Department of Public Safety while the person is incarcerated, under civil commitment, or residing outside Connecticut. Conn. Gen. Stat. § 54-257(b)-(c).

50. Persons required to register under Conn. Gen. Stat. §§ 54-251 or 54-254 must submit an address verification form annually after their initial registration dates. Conn. Gen. Stat. § 54-257(c).

51. Persons required to register under Conn. Gen. Stat. § 54-252 must submit an address verification form every ninety days after their initial registration dates. Conn. Gen. Stat. § 54-257(c).

52. Failure to return address verification forms or providing false registration information subjects registrants to possible arrest and prosecution for a class D felony. Conn. Gen. Stat. § 54-257(c).

53. All persons required to register who change their address are required to register the new address in writing with the Commissioner of Public Safety within five days of the change. Conn. Gen. Stat. §§ 54-251(a), 54-252(a).

54. Failure to register a new address with the Commissioner of Public Safety within five days subjects registrants to possible arrest and prosecution for a class D felony. Conn. Gen. Stat. §§ 54.251(d), 54-252(d), 54-253(c).

55. Upon information and belief, the State of Connecticut does not impose registration requirements with criminal penalties on persons with criminal convictions who have completed their sentences other than persons required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*

56. Upon information and belief, persons other than those required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* are not subject to possible arrest and felony prosecution for failure to provide current residence information on an ongoing basis to the State of Connecticut.

57. Upon information and belief, persons other than those required to register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.* are not subject to possible arrest and felony prosecution for failure to have a photograph taken by the Department of Public Safety.

E. Public Dissemination of Information Regarding Persons Designated as Sex Offenders.

58. Upon receipt of registration information, the Department of Public Safety is responsible for entering this information into a registry of persons required to register as "sexual offenders." Conn. Gen. Stat. § 54-257(a).

59. The sex offender registry must be made accessible to the public at the Department of Public Safety, each local police department, and each state police troop in Connecticut. Conn. Gen. Stat. § 54-258(a)(1).

60. The Department of Public Safety is also required to make registry information available to the public through the Internet. Conn. Gen. Stat. § 54-258(a)(1).

61. The Department of Public Safety is required to issue notices, not less than once per calendar quarter, to all print and electronic media in Connecticut regarding the availability and means of accessing the sex offender registry. Conn. Gen. Stat. § 54-258(a)(1).

62. The Department of Public Safety sex offender registry website includes registration information regarding all persons who register pursuant to Conn. Gen. Stat. §§ 54-250 *et seq.*, except for those who qualify for court-ordered restriction on dissemination of registration information.

63. Upon a conviction or finding of not guilty by reason of mental disease or defect, the Court may order the Department of Public Safety to restrict the dissemination of registration information for law enforcement purposes and not make it available to the public for

certain registrants if the court finds that dissemination of the information would be likely to reveal the identity of the victim within the community where the victim resides and dissemination is not required for public safety. Conn. Gen. Stat. § 54-255(a)-(b).

64. The court authority to order restricted dissemination of registration information upon a conviction or finding of not guilty by reason of mental disease or defect applies to persons who meet one of the following descriptions:

a. persons convicted or found not guilty by reason of mental disease or defect of the class B felony of sexual assault in a spousal or cohabiting relationship, Conn. Gen. Stat. § 54-255(a); or

b. Persons convicted or found not guilty of any offense requiring registration where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in Conn. Gen. Stat. § 46b-21, Conn. Gen. Stat. § 54-255(b).

65. Certain persons convicted or found not guilty by reason of mental disease or defect of offenses between October 1, 1988 and June 30, 1999 may petition the court to order the Department of Public Safety to restrict the dissemination of registration information for law enforcement purposes and not make it available to the public for certain registrants. Conn. Gen. Stat. § 54-255(c).

66. The court authority to order restricted dissemination of information for persons convicted or found not guilty of an offense between October 1, 1988 and June 30,

1999 applies to persons who meet one of the following descriptions:

a. Persons convicted or found not guilty by reason of a mental disease or defect of engaging in sexual intercourse with another person and such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person and under nineteen years of age at the time of offense, Conn. Gen. Stat. § 54-255(c)(1);

b. Persons convicted or found not guilty by reason of a mental disease or defect of subjecting another person to sexual contact without such other person's consent, Conn. Gen. Stat. § 54-255(c)(2);

c. Persons convicted or found not guilty by reason of a mental disease or defect of any offense requiring registration where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in Conn. Gen. Stat. § 46b-21, Conn. Gen. Stat. § 54-255(c)(3);

d. Persons convicted or found not guilty by reason of a mental disease or defect of sexual assault in a spousal or cohabiting relationship, Conn. Gen. Stat. § 54-255(c)(4); or

e. Persons convicted or found not guilty by reason of a mental disease or defect of any crime which requires registration when the offender (i) served no jail or prison time as a result of such conviction or finding of not guilty by reason of mental disease or defect, (ii) has not been subsequently convicted or found not guilty by reason of mental disease or defect of any crime which

would require registration, and (iii) has registered with the Department of Public Safety, Conn. Gen. Stat. § 54-255(c)(5).

67. As a condition of ordering that a person's registration information not be made available for public access pursuant to Conn. Gen. Stat. § 54-255(c), the court must find that the dissemination of the information is not required for public safety. Conn. Gen. Stat. § 54-255(c).

68. The statute does not provide any standards for a court to determine when dissemination of registration information is or is not required for public safety.

69. The Department of Public Safety sex offender registry does not provide sufficient information for members of the public to determine whether any particular person who appears on the registry poses a threat to public safety.

F. Community Notification Regarding Sex Offenders.

70. Upon receipt of registration information, the Department of Public Safety is responsible for notifying the local police department or state police troop having jurisdiction where the registrant resides or plans to reside. Conn. Gen. Stat. § 54-257(a).

71. Any state agency, the Judicial Department, any state police troop or any local police department are authorized to notify any government agency, private organization or individual of any registration information when such agency, said Department, such troop or local police department believes such notification is necessary to protect the public or any individual in any jurisdiction

from any person who is subject to registration. Conn. Gen. Stat. § 54-258(a)(2).

72. Conn. Gen. Stat. §§ 54-250 *et seq.* does not provide any standards to determine the circumstances when notification is necessary to protect the public or any individual in any jurisdiction pursuant to Conn. Gen. Stat. § 54-258(a)(2).

73. Upon information and belief, the Department of Public Safety does not have a procedure to permit registrants to contest the necessity of notification to protect the public or any individual in any jurisdiction from the registrant.

74. Upon information and belief, the Office of Adult Probation has a practice of notifying members of the public regarding certain persons subject to the supervision of the Office of Adult Probation for purposes of public safety.

75. Upon information and belief, other than a court hearing dealing with the issue of notification by the office of Adult Probation of members of the community with regard to an individual under the supervision of the Office of Adult Probation, there is no formal procedure afforded by the Office of Adult Probation for contesting the necessity of notification to members of the community regarding a person convicted of a sexual offense with whom they may have contact.

G. Public Perception of Sex Offender Designation.

76. The system of designating persons as "sex offenders" as described above suggests to the public that

Connecticut law enforcement officials have determined that persons so designated pose a threat to public safety.

77. However, registration is required solely on the basis of a conviction for one of the offenses listed in the statute. Widespread dissemination of a person's designation as a "sex offender" and his identifying information occur without any assessment of whether the person in fact poses any danger to the community.

78. Persons designated as "sex offenders" are unfairly stigmatized and threatened with the adverse consequences resulting from the public perception that they are currently dangerous sex offenders who pose a threat to the safety of the community.

Irreparable Harm to Plaintiff and Class Members

79. The defendants' enforcement of Conn. Gen. Stat. §§ 54-250 *et seq.* threatens the plaintiff and the members of the classes he seeks to represent with continuing irreparable injury for which there is no adequate remedy at law, including the following:

a. Plaintiff and the members of the due process class are being publicly branded as currently dangerous sex offenders who pose a threat to public safety regardless of whether there is any basis for such an assessment;

b. Plaintiff and the members of the due process class do not have a constitutionally sufficient means of contesting their designation in the eyes of the public as currently dangerous sex offenders who pose a threat to public safety;

c. Plaintiff and the members of the ex post facto class are suffering punishment that was not authorized by the law as it existed at the time of the conduct resulting in their convictions;

d. Plaintiff and the members of both classes face possible felony prosecution if they fail to comply with the registration or address verification requirements of Conn. Gen. Stat. §§ 54-250 *et seq.*;

e. Plaintiff and the members of both classes face possible felony prosecution if they fail to comply with the requirement that they submit to having a blood sample taken for DNA analysis; and

f. Plaintiff and the members of both classes are threatened with a multitude of possible adverse consequences resulting from being branded as currently dangerous sex offenders, including shame, humiliation, ostracism, loss of employment, decreased employment opportunities, interference with business opportunities, loss of housing, interference with family and social relationships, and possible physical harm inflicted by members of the public who believe that plaintiff and the class members pose a threat to public safety.

80. Unless the defendants are enjoined from further enforcement of Conn. Gen. Stat. §§ 54-250 *et seq.*, plaintiff and the class members will continue to suffer irreparable injury for which there is no adequate remedy at law.

First Cause of Action

81. Paragraphs 1 through 80 are realleged as if fully set forth herein.

82. Plaintiff and the members of the due process class have constitutionally protected liberty and property interests in not being falsely designated as currently dangerous sex offenders who pose a threat to public safety.

83. The liberty and property interests of the plaintiff and the members of the due process class arise under the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and Article First, sections 7, 8, 9, and 10, of the Connecticut Constitution.

84. The conduct of the defendants has stigmatized the plaintiff and the members of the due process class as currently dangerous sex offenders without any procedure to determine whether there is any factual basis for labeling plaintiff and the class members as a threat to public safety.

85. The conduct of the defendants has deprived and threatens to deprive the plaintiff and the members of the due process class of their constitutionally protected liberty and property interests without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Second Cause of Action

86. Paragraphs 1 through 85 are realleged as if fully set forth herein.

87. Plaintiff and the members of the ex post facto class have convictions arising out of conduct that occurred prior to the enactment of the registration and public disclosure provisions that apply to them.

88. The registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* impose punishment in violation of the Ex Post Facto Clause, Article I, Section 10, of the United States Constitution.

89. The registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.* are punitive in that they provide for widespread public dissemination of the designation of persons as "sex offenders" based solely on the existence of a conviction for an offense enumerated in the statute without any assessment of whether the person poses a threat to public safety.

90. The conduct of the defendants has deprived the plaintiff and members of the ex post facto class of their rights protected by the Ex Post Facto Clause.

WHEREFORE, plaintiff requests the following relief:

1. A declaratory judgment holding that Conn. Gen. Stat. §§ 54-250 *et seq.* violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

2. A declaratory judgment holding that Conn. Gen. Stat. §§ 54-250 *et seq.* violates the Ex Post Facto Clause of the United States Constitution;

3. A preliminary and permanent injunction prohibiting defendants, their employees, agents and successors in office from further enforcement of the registration and public disclosure provisions of Conn. Gen. Stat. §§ 54-250 *et seq.*;

4. A preliminary and permanent injunction prohibiting defendants, their employees, agents and successors in office from further public disclosure of the information

compiled in the Department of Public Safety sex offender registry;

5. A preliminary and permanent injunction requiring defendants, their employees, agents and successors in office to notify all other governmental entities to which information compiled in the Department of Public Safety sex offender registry has previously been transmitted that they must refrain from further public disclosure of such information;

6. An award of plaintiff's costs and attorneys' fees pursuant to 42 U.S.C. § 1988, and

7. Such other and further relief as this Court deems necessary and proper.

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, Plaintiff,	:	
V.	:	CASE NO. 3:99CV0314(RNC)
DR. HENRY C. LEE, ET AL., Defendants.	:	

RULING AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff brings this action challenging the constitutionality of the Connecticut sex offender registry act ("CT-SORA"), which requires registration by, and public disclosure of information concerning, persons designated as "sexual offenders." Plaintiff claims that the statute, commonly referred to as Connecticut's Megan's Law, deprives him of a protected liberty interest in violation of the Fourteenth Amendment's Due Process Clause and, as applied to him, violates the Constitution's Ex Post Facto Clause. Cross-motions for summary judgment have been filed on potentially dispositive legal issues regarding liability.[1] The parties agree that two issues can be decided on the record presented at this stage: (1) whether the CT-SORA imposes a "stigma" on registrants for purposes of the "stigma plus" test used to establish a liberty interest

[1] Plaintiff's Fourth Amended Complaint contains class action allegations as to both claims. The parties agree that class certification issues should not be decided until after the issues presented by the cross-motions are resolved.

protected by the Due Process Clause; and (2) whether the statute violates the Ex Post Facto Clause.[2]

Plaintiff's motion for summary judgment on the due process claim is granted essentially because the undifferentiated nature of the registry stigmatizes nondangerous registrants by grouping them together with dangerous registrants.[3] Plaintiff alleges that he is not dangerous; the registry system alters his legal status (thereby satisfying the "plus" element of the stigma plus test); and the State provided no procedure to determine whether plaintiff is currently dangerous before including him in the registry. Defendants' motion for summary judgment on the ex post facto claim is granted because the legislature did not enact the CT-SORA with punitive intent and the law's effects are not so punishing as to render it punitive in fact. Because the parties have not yet addressed remedies, no ruling is made as to remedy at this time.

[2] Plaintiff contends that the remaining aspects of the due process claim can be decided at this time as well. Defendants disagree.

[3] By undifferentiated I mean a system like Connecticut's, which places all registrants in one class for notification purposes – "sex offender" – without attempting any individualized assessment of their dangerousness or likelihood of reoffense. One commentator has termed systems without individualized risk assessment "compulsory" registries and has calculated that nineteen states have adopted such systems. *See* Wayne A. Logan, *A Study in "Actuariol Justice: Sex Offender Classification Practice and Procedure,"* 3 *Buff. Crim. L. Rev.* 593, 603 (2000) The remaining states and the District of Columbia use approaches that involve the exercise of varying degrees of discretion on the part of classifying authorities. *See id.* at 606-19. An example of a differentiated, or classified, system is New York's three-tier system, described in *Doe v. Pataki*, 120 F.3d 1263, 1266-70 (2d Cir. 1997).

Background

A. The Statutory Scheme

In 1998 and 1999, the Connecticut legislature revised the State's version of Megan's Law in ways that spawned this lawsuit. *See* Public Acts No. 98-111 & 99-183 (codified as C.G.S. §§ 54-250 to -261) (collectively referred to as the "CT-SORA").[4]

Registration Obligations

Under the CT-SORA, persons who have been convicted or found not guilty by reason of mental disease or defect of enumerated offenses must register with the Commissioner of Public Safety ("Commissioner") within three days of their release into the community. All registrants must provide the same information: name, residence address, criminal history record, fingerprints, a photograph, and a description of such other identifying characteristics as the Department of Public Safety ("DPS") requires (such as scars and tattoos). If a registrant moves, he must notify the Commissioner in writing of the new address within five days.[5] Registrants must also complete

[4] Federal law conditions a state's receipt of certain federal law enforcement grants on the creation of a sex offender registry program. *See* 42 U.S.C. § 14071. Among other things, a state must register persons convicted of certain offenses and provide the information to the F.B.I. and local law enforcement. The federal law requires that the information be released to the extent necessary to protect the public from specific individuals but does not require a state to apply its program retroactively.

[5] If the registrant moves to another state, he must contact and register with any sexual offender registry agency in the other state. Similarly, if a registrant regularly travels to or temporarily resides in

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and return address verification forms sent to them by the Commissioner and submit to the retaking of a photograph at least every five years. Failure to comply with the requirements of the CT-SORA is a class D felony, punishable by up to five years in jail.

The statute applies to persons convicted of four types of offenses: criminal offenses against a victim who is a minor; nonviolent sexual offenses; violent sexual offenses; and felonies committed for sexual purposes. The burdens imposed on registrants vary depending on the type of offense committed. Some offenders are obligated to maintain their registrations for life,[6] while others must do so for ten years.[7] Registrants must complete and return address verification forms either annually[8] or every ninety days.[9]

The DPS is required to maintain a central registry of the information submitted by sex offenders. On receipt of an individual's information, the DPS is required to provide

another state, he must inform the Commissioner and notify the registry agency in the other state.

[6] Life registrants include persons who were required to register under the pre-1998 version of the CT-SORA; persons who have committed violent sexual offenses; and persons who have committed a second criminal offense against a minor or nonviolent sexual offense.

[7] Ten-year registrants include persons convicted for the first time of an offense against a minor or a nonviolent sexual offense, as well as persons who have committed a felony for a sexual purpose.

[8] Persons who have committed offenses against a minor, nonviolent sexual offenses, or felonies with sexual purposes are subject to annual verification.

[9] Persons who have committed violent sexual offenses must return forms every ninety days.

it to local law enforcement officials with jurisdiction over the registrant's address.[10]

Public Disclosure

The DPS must make the registry available to the public in a number of ways.[11] First, the central registry maintained at the DPS must be available to the public during regular business hours. Second, local law enforcement agencies must make the information that DPS has transmitted to them available during business hours. Third, the DPS is required to make the registry information available over the Internet. Finally, the DPS must annually remind the state's media that the registry exists and provide them with information on how it can be accessed. *See* C.G.S. § 54-258(a)(1).

An uncodified provision of P.A. 99-183 requires that any dissemination of the registry be accompanied by the

[10] If the registrant's address is in another state, the DPS must provide the information to the registry agency in the other state. *See* C.G.S. § 54-257(a). For all registrants, the DPS must transmit all registration information, conviction data, photographs, and fingerprints to the F.B.I. *See id.*

[11] The CT-SORA does not require proactive community notification regarding any registrant's information. However, "[a]ny state agency, the Judicial Department, any state police troop or any local police department may, at its discretion, notify any government agency, private organization, or individual of registration information when such agency, said department, such troop or such police department, as the case may be, believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration." *See* C.G.S. § 54-258(a)(2). The CT-SORA provides no guidelines for how these entities are to exercise their discretion.

following warning: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." P.A. 98-183 § 10.

Exemption, Limitation, or Suspension of Registration

Two narrow classes of offenders may be completely exempted from the obligation to register if a court finds that registration is not necessary to protect the public. *See* C.G.S. § 54-251(b), (c).[12]

The registry data of select other offenders may be restricted by court order to use for law enforcement purposes only.[13] For any of these offenders, the court may

[12] Persons convicted of fourth-degree sexual assault for subjecting another person to sexual contact without consent are eligible for exemption, as are persons who were under 19 at the time of their offense and were convicted of having sexual intercourse with someone who was (1) more than two years younger than they and (2) between the ages 13 and 16 at the time of the offense.

[13] There are two ways an offender's information can become restricted. First, when the registrant's offense is sexual assault in a spousal or cohabitating relationship, *see* C.G.S. 53a-70b, or an offense against a person who, at the time of the offense, was under 18 and living in the registrant's household, the court can restrict access to law enforcement if it finds that public dissemination would likely reveal the identity of the victim. *See* C.G.S. § 54-255(a).

Second, certain registrants are entitled to petition for such an order. This right of petition is available to (1) registrants who committed specific offenses between October 1, 1988, and June 30, 1999, regardless of their sentence or subsequent criminal history; and (2) any registrant convicted between October 1, 1988, and September 30, 1998, of any offense requiring registration if he served no jail time as a result of the conviction, has not been subsequently convicted of an offense that

(Continued on following page)

enter an order restricting dissemination of registry information only after finding that public safety does not require general public access to the information.

Finally, a person's registration is suspended if he becomes incarcerated or civilly committed or takes up residence in another state. *See* C.G.S. § 54-257(b).

B. Additional Undisputed Facts

The DPS has a procedure in place to respond to challenges to the accuracy or completeness of registry information, but otherwise has no discretion in determining whether individuals must register. Moreover, none of the agencies involved in the registration process (i.e., the DPS, the Department of Corrections, or the Office of Adult Probation) conducts any individualized assessment of the public safety threat posed by an individual when deciding whether he must register.

C. The Web Site

The DPS Sex Offender Registry web site permits any Internet user visiting the site to search and display the information contained in the registry database. The database can be searched by last name, the first letter of a last name, a town name, or a zip code. Searching by a town or zip code provides a list of the names of all registrants living in that area.

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requires registration, and has been registered with the DPS as required by the CT-SORA. *See* C.G.S. § 54-255(c).

Clicking on a listed name brings up a web page entitled "Registered Sex Offender." If the registrant has complied with the CT-SORA's requirements, there have been no technical difficulties, and the DPS has had time to process and post the registrant's information, this page contains the registrant's name, offense, current residence address, physical description and photograph.

At the time the parties filed their briefs, the front page of the web site included the following language:

> This information is made available for the purpose of complying with Connecticut General Statutes § 54-250 et seq., which requires the Connecticut Department of Public Safety to establish and maintain a registry of persons who are required to register under sections 54-250 through 54-254 of the General Statutes. [Those statutes require that certain individuals be included in the registry because of their conviction or finding of not guilty by reason of mental disease or defect of a specified criminal offense and subsequent release into the community on or after October 1, 1988.] The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the Registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and

> accessible, not to warn about any specific individual. Anyone who uses this information to injure, harass, or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.

D. The Plaintiff

Plaintiff is required to register under the CT-SORA. He alleges in the Fourth Amended Complaint that he is not a dangerous sexual offender and does not pose a threat to the safety of the community. Defendants contend that all the information on the CT-SORA web site regarding plaintiff is accurate and that he provided the information regarding his birth date, address, physical description, criminal offenses, and other identifying information. Plaintiff does not contend that any piece of data is inaccurate.

Discussion

I. Due Process Claim

Plaintiff claims the CT-SORA violates the Due Process Clause of the Fourteenth Amendment. To succeed on this procedural due process claim, plaintiff must demonstrate (1) that the CT-SORA deprives him of a constitutionally protected liberty interest; and (2) that the procedures attending the deprivation are inadequate. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

[14] Since the briefs were filed, the DPS has modified the format of the front page and the language quoted in the text no longer appears as a single paragraph; however, the substance of the quoted paragraph remains on the front page.

To establish a protected liberty interest, plaintiff must satisfy the "stigma plus" test applied in the Second Circuit. *See Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994); *Doe v. Pataki*, 3 F.Supp. 2d 456, 467 (S.D.N.Y. 1998).

Plaintiff prevails on the due process claim because the State has not provided him with any opportunity to challenge the stigmatizing allegation, implied by his inclusion in the publicly available registry, that he is a dangerous sex offender. The implied allegation, which plaintiff contends is false, arises from the undifferentiated nature of the registry, in which dangerous and nondangerous registrants are grouped in a single classification and no information is provided regarding any registrant's dangerousness. Because there can be no doubt that some registrants are dangerous, Connecticut's single classification falsely suggests that nondangerous registrants are a threat to public safety. In addition to falsely stigmatizing nondangerous registrants, the CT-SORA alters their legal status under state law.[15]

[15] Defendants suggest that the undifferentiated nature of the registry requires rejection of plaintiff's due process claim because a hearing would not serve any useful purpose. *See, e.g.* Defs.' Mem. at 20-21, 30-31. However,

> the fact that a particular jurisdiction's registration and notification scheme does not differentiate among offenders, and thus relies exclusively upon blanket legislative assessment of community danger, should not alter the liberty interest analysis. The constitutional question is not whether offender differentiation is contemplated by the particular statutory scheme in question; rather, it is whether a liberty interest exists sufficient to warrant due process protection.

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A. Stigma

Plaintiff first must prove that his "inclusion in the [publicly disseminated sex offender registry] will result in stigma, that is, in 'public opprobrium' and damage to [his] reputation." *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994) (quoting *Bohn v. County of Dakota*, 772 F.2d 1433, 1436 n.4 (8th Cir. 1985)). Plaintiff contends that he is stigmatized because his inclusion in the registry conveys the false message that he is a dangerous sex offender and a threat to public safety. Defendant contends that the registry sends no message about a registrant's dangerousness and communicates only the admittedly accurate information that plaintiff has been convicted of a crime requiring registration.

When, as here, a plaintiff seeks not damages but rather an opportunity to be heard in order to establish that a communication about him is false, the plaintiff need only allege – not prove – that the communication at issue is not true. *See Brandt v. Board of Coop. Ed. Servs.*, 820 F.2d 41, 42-44 (2d Cir. 1987) (citing *Codd v. Velger*, 429 U.S. 624, 627 (1977) (finding plaintiff's action for name-clearing hearing fatally deficient because of failure to contend that employer's communication was false).[16]

Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 *J. Crim. L. & Criminology*, 1167, 1210-11 (1999).

[16] *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 177 (2d Cir. 1991), which states that "plaintiff must establish that the information was stigmatizing, false, and publicized by the state actor," is not to the contrary. *Kelly Kare* cited *Brandt* as the primary authority for the quoted proposition and indicated no disagreement with the distinction made by *Brandt* between actions for damages and actions seeking a

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Accordingly, to establish that the CT-SORA implicates a liberty interest, plaintiff must establish that the charge against him is stigmatizing, that he alleges it to be false, and that a plus factor is present. Plaintiff satisfies the allegation-of-falsity element by the amendment to his complaint approved today in a separate order. *See* Fourth Am. Compl. ¶ 4.

The stigma question thus becomes whether, assuming plaintiff is not dangerous, public dissemination of the sex offender registry conveys the erroneous message that he is. The answer to this question must be yes. Despite the accuracy of the registry data concerning the plaintiff and the statement on the web site that no determination of any individual's dangerousness has been made, the registry suggests that plaintiff is currently dangerous. Specifically, the undifferentiated nature of the registry and the undisputed purposes of the CT-SORA make it reasonable for a viewer of the registry to conclude that any particular registrant is dangerous.[17]

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name-clearing hearing. While the *Kelly Kare* plaintiff did seek an injunction, the decision in that case did not turn on whether the plaintiff had alleged or proven falsity. Rather, the court found that, because the county had been silent as to the reason for its termination of Kelly Kare's contract, there was no communication that could be seen as stigmatizing or false.

[17] Plaintiff contends that the registry's availability on the Internet is by itself an additional contextual factor that conveys the message that registrants are dangerous. Governmental use of the Internet to disseminate information is now common place, however, and no special message should be associated with the registry simply because it can be accessed via the Internet. Adopting plaintiff's position would prohibit the State from taking information that is already publicly available in its compiled form and making it more readily available.

The stated purposes of the CT-SORA are to protect the public and facilitate law enforcement.[18] Registration and dissemination serve these goals only because some registrants are likely to reoffend. Thus, the message that some registrants are currently dangerous is, and is intended to be, communicated to viewers of the registry.

A person viewing any one registrant's information is told that the State has not assessed the registrant's risk of reoffense and has not determined whether he is currently dangerous. While it is true, then, that the viewer has no reason to think the registrant is one of those who is dangerous, the viewer also has no reason to think the registrant is not dangerous. Because there is no classification system, the viewer has neither absolute nor relative information regarding the dangerousness of the registrant. Without such information, the viewer could reasonably conclude that the registrant is likely to reoffend.

Defendants do not dispute that within the group of persons required to register as sex offenders there is significant variation in the likelihood of particular offenders committing another "sex offense."[19] This variation is

[18] Defendants contend that these are the statute's purposes. Plaintiff has provided numerous news articles supporting his contention that the State has contributed to public understanding of these purposes through statements made by the Governor, legislators, the Commissioner, and other officials.

[19] This is particularly true for the Connecticut system, under which some of the "sex offenses" do not require any sexual conduct by the registrant. These nonsexual sex offenses include various degrees of kidnapping and unlawful restraint when the victim is under 18. While these offenses are classified by the statute as criminal offenses against a minor rather than as violent or nonviolent sexual offenses, registrants

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presumably the reason why other states have adopted a tiered registry and notification system, under which sex offenders are subgrouped according to their individually assessed risk of reoffense. *See Doe v. Pataki*, 3 F.Supp. 2d 456, 462 (S.D.N.Y. 1998) (describing the New York system, which has low-, moderate-, and high-risk classes). In a tiered system, a recipient of a registrant's information can discern the dangerousness of that registrant relative to the universe of sex offenders. By omitting to provide such relative information, Connecticut's system has the effect of falsely suggesting that nondangerous registrants are in fact dangerous.[20]

B. Plus Factors

Damage to reputation, without more, is insufficient to establish a liberty interest protected by the Due Process Clause. The stigmatizing conduct must be accompanied by some tangible injury or material alteration of legal right or status. *See Paul v. Davis*, 424 U.S. at 701, 708; *Valmonte v. Bane*, 18 F.3d at 999-1000. Plaintiff satisfies this plus element because the registration requirements of the CT-SORA alter his legal status under state law.

The CT-SORA requires registrants to appear at the Department of Public Safety to register or undergo registration processes before their release from incarceration.

convicted of these offenses are still grouped under the label "sex offender."

[20] *Cf. Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999) (noting that community notification "strongly implies that [a registrant] is a likely recidivist and a danger to his community.")

For at least ten years after that, and possibly for life, a registrant must maintain his registration by completing forms periodically mailed to him by the Department and appearing at the DPS to have his photograph taken at least every five years. During his registration period, a registrant must promptly inform the DPS any time he moves or if he regularly travels to or temporarily resides in another state. If a registrant does move to, regularly travel to, or temporarily reside in another state, he must ascertain if that state has a registration agency and whether he is required to register with it; if that is the case, he must then perform whatever acts are required to comply with the other state's registry program. Failure to comply with any of the registration requirements is a Class D felony, punishable by imprisonment for up to five years.[21]

Defendants counter with two arguments: first, that the registration requirements are incidental, regulatory burdens, which cannot satisfy the plus element; and, second, that the registration burdens do not measure up to the type of deprivation of a right that the Second Circuit has previously held to be a plus factor.

Defendants' first line of argument misses the mark. The burdens on registrants are significantly more extensive than

[21] Relying on my ruling in *Doe v. DPS*, No. 3:99CV135, slip op. (D. Conn. Mar. 9, 1999) and on *Doe v. Pataki*, 3 F.Supp. 2d at 468, plaintiff argues that these requirements constitute an alteration of legal status sufficient to satisfy the plus element. The obligations imposed by the CT-SORA as just described are more burdensome than they were when I ruled in *Doe v. DPS* and in their current form are more burdensome than the ones described in *Doe v. Pataki*.

simply providing change of address information, which is how defendants characterize them. Moreover, while courts have found registration requirements to be regulatory and nonpunitive – and therefore not an affirmative disability or restraint for ex post facto purposes – it does not follow that such requirements do not alter a registrant's rights or status under state law.

Defendants' second argument, which suggests that the plus factor can come only from a deprivation of employment closely linked to the stigmatizing conduct, is also unavailing. Courts have held that the alteration of legal status and the burdens accompanying registration under a sex offender law satisfy the plus element. *See Doe v. Pataki*, 3 F.Supp. 2d 456, 468 (S.D.N.Y. 1998); *W.P. v. Poritz*, 931 F.Supp. 1199, 1219 (D.N.J. 1996); *Doe v. Attorney General*, 715 N.E.2d 37, 43 (Mass. 1999) (interpreting the Massachusetts Constitution).[22] Moreover, while *Valmonte v. Bane* and other Second Circuit cases finding stigma-plus arise in the employment context, *Valmonte* recognizes that none of those cases "foreclosed the possibility that the 'plus' element could come from some other independent deprivation." *Valmonte*, 118 F.3d at 1002. *Valmonte* requires that the plus factor come from a "tangible burden" separate from the "deleterious effects which flow directly from a sullied reputation." *Id.* at 1001. *Paul v. Davis*, 424 U.S. 693 (1976), speaks generally of the

[22] *Doe v. Pryor*, 61 F.Supp. 2d 1224 (M.D. Ala. 1999), also found a plus factor in the burdens of a sex offender statute, but those burdens went beyond the CT-SORA's registration requirements to include prohibitions on living or working within 1000 feet of a school or day care center, residing with a minor child not the registrant's biological or adopted child, and changing one's name. *See id.* at 1227.

alteration or deprivation of a legal right or status under state law, *see id.* at 711-12, and identifies (without using the term) the plus factor in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), as the loss of the right to buy alcohol, which has no direct connection with employment, *see id.* at 708-09.

The burdens imposed by the CT-SORA may entail greater infringement on personal liberty than the type of deprivation at issue in employment cases. In those cases, the government statute, policy, or statement does not mandate any future action by the target of the defamation. Rather, the plus factor is generally satisfied by a one-time event that has already occurred, such as dismissal from an existing job or preclusion from another job. The CT-SORA, on the other hand, requires nondangerous registrants to repeatedly take specific actions to facilitate the government's ongoing defamatory communications. This is no small matter. As the Massachusetts Supreme Judicial Court has noted, registration under a sex offender statute is

> a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government.

Doe v. Attorney General, 715 N.E.2d 37 at 43. Because the registration requirements alter the offenders' status under state law, they satisfy the plus element and plaintiff has thus established that the registry's "allegation" that he is

dangerous implicates a liberty interest protected by the Fourteenth Amendment.[23]

C. The Process that is Due

Having determined that dissemination of the undifferentiated registry deprives nondangerous registrants of a constitutionally protected liberty interest, I turn to consider whether the procedural safeguards provided by the State are adequate. Due process requires, at a minimum, notice and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Beyond that, the amount of process due is generally determined under the framework of *Mathews v. Eldridge*. In this case, it is not necessary to engage in the *Mathews* balancing because it is undisputed that the CT-SORA provides no procedure to determine a person's dangerousness before he is included in the registry. It suffices to say that under the Connecticut system nondangerous registrants do not have an adequate opportunity to be heard before the deprivation of their liberty interest and thus are denied their Fourteenth Amendment right to due process.

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[23] Plaintiff contends that the stigmatizing conduct denies a protection of reputation guaranteed by Article I, § 10, of the Connecticut Constitution, will have negative effects on the employment prospects and family relationships of registrants, and will likely result in harassing and abusive attacks on registrants. Because the burdens of the registration requirements constitute a plus factor, there is no need to address these other alleged consequences of the CT-SORA.

II. Ex Post Facto Clause

Plaintiff's claim based on the Ex Post Facto Clause presents the question whether the CT-SORA imposes a penal sanction. The Ex Post Facto Clause forbids application of a new penal sanction to a crime that has already been committed. *See Kansas v. Hendricks*, 521 U.S. 346, 370 (1997); *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir. 1997) (hereinafter "*Doe*"). The Second Circuit has established a two-part test to determine whether a law is penal: first, whether the legislature intended the statute to be criminal or civil; and, second, if the intent was nonpunitive, whether the statute is so punitive in fact that it cannot legitimately be seen as civil in nature. *See Doe*, 120 F.3d at 1274-75. The features of the CT-SORA on which plaintiff primarily relies (namely, widespread dissemination of registration information with no individualized assessment of dangerousness) make this a somewhat closer case than recent cases in which the Second Circuit rejected ex post facto claims. *See Doe; Roe v. Office of Adult Probation*, 125 F.3d 47 (2d Cir. 1997). However, I agree with the defendants that the CT-SORA is regulatory in both intent and effect. Accordingly, their motion for summary judgment on the ex post facto claim is granted.

A. Legislative Intent

Public Acts 98-111 and 99-183 are not Connecticut's first enactment of Megan's Law; they are follow-on statutes to an earlier version. The Second Circuit has stated that the earlier version was enacted in response to concerns "regarding the harm to society caused by sex crimes and the relatively high rate of recidivism among sex

offenders." *Roe*, 125 F.3d at 48. The Connecticut Supreme Court has expressly agreed with the Second Circuit's characterization. *See Connecticut v. Misiorski*, 738 A.2d 595, 601-602 (Conn. 1999). Given the nonpunitive purpose of the prior law, plaintiff can succeed on his ex post facto claim only if he demonstrates that the legislature acted with punitive intent when it amended the prior law or that the new regime it created is punitive in fact.

The legislature's intent, which can be either express or implied, *see Hudson v. United States*, 522 U.S. 93, 99 (1997) (citing *United States v. Ward*, 448 U.S. 242, 248 (1980)), is determined by considering the law's legislative history, its text, (including any preamble), and its structural features. *See Doe*, 120 F.3d at 1276-78. The limited legislative history materials the parties have provided, which are somewhat informative on the issue of intent, do not establish that the legislature abandoned its nonpunitive purpose.[24] Plaintiff makes no claim that the text of the

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[24] In general, comments of individuals involved in the legislative process do not provide a sure basis for determining legislative purpose. *See Doe*, 120 F.3d at 1277 (noting that "floor debates are of particularly limited assistance in resolving highly controversial issues of legislative intent.") The views expressed by a law's sponsors, however, are entitled to greater weight than those of other commentators. *See id.* Defendants present the Connecticut House Judiciary Committee testimony of Michael Cicchetti, Undersecretary of the Office of Policy and Management ("OPM"), introducing P.A. 99-183, who stated that the purpose of the registry law is to "make it possible for the public to protect itself" and not to impose "additional punishment for [sex] offenders." OPM was one of the many government agencies that participated in a committee established by P.A. 98-111 to monitor the implementation of P.A. 98-111 and to recommend amendments. The bill Cicchetti introduced contained those recommendations, and he can be regarded as speaking on behalf of the bill's sponsors. The floor statements of the sponsors of both bills and their answers to questions, viewed as a

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law manifests a punitive intent, and there is nothing in the text that suggests the legislature sought to punish sex offenders rather than protect public safety.[25] That leaves the statute's structural features.

Several features of the law clearly support a nonpunitive public-safety orientation: (1) an offender is not required to register, and thus no information can be made publicly available, until the time of his release, *cf. Doe*, 120 F.3d at 1278 (noting that the offender's assessment is not done until just before release); (2) any public dissemination of registry information must provide a warning that anyone who uses the information to harass a registrant is subject to criminal prosecution; (3) while the class of registrants eligible to petition to be relieved of the registration or notification burdens is narrower than in other systems, the burden on those eligible to petition is to show that they are not a danger to the public; and (4) an offender's registration is suspended when he is in jail or living out of the state and thus does not present a danger to Connecticut residents.

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whole, also show that the law's purposes are to protect the public and facilitate law enforcement.

Plaintiff cites statements by other legislators, who recognized the detrimental effects on an offender's life that are incidental to registration and notification. Those citations do not establish that those legislators or any others acted for the purpose of bringing about such effects. As in *Doe*, plaintiff here has failed to produce legislative history that provides the "'unmistakable evidence of punitive intent' required to demonstrate punitive motivation." *Doe*, 120 F.3d at 1277 (citing *Flemming v. Nestor*, 363 U.S. 603, 619 (1960)).

[25] Neither P.A. 98-111 nor P.A. 99-183 contains any preamble or statement of purpose to assist in resolving this question of legislative intent.

On the other hand, the CT-SORA differs from the statute in *Doe* and the policy in *Roe* in the following ways: (1) the amount of information about a registrant that is revealed, and the way in which it is revealed, is not linked to any individualized assessment of the registrant's dangerousness; (2) some of the safeguards regarding the release of information that were noted by the *Doe* court are not provided;[26] and (3) a defendant must be made aware of the registration and notification requirements before entering a guilty plea to an enumerated offense, something apparently not required by the statute in *Doe*.

These differences, taken separately or cumulatively and viewed in light of the legislative history and the structural features indicating a regulatory purpose, do not demonstrate that the legislature acted with punitive intent when it adopted Public Acts 98-111 and 99-183.[27]

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[26] Unlike the New York statute in *Doe*, the CT-SORA does not create a new criminal offense for misuse of registry information and does not require any identifying information from a member of the public prior to giving him or her access to the registry.

[27] It bears noting that the individualized assessments in *Doe* and *Roe* were part of a system that involved significant, potentially mandatory proactive notification of victims, family, neighbors, employers, and at-risk groups.

Also, while a defendant who seeks to plead guilty must be informed of the potential punishment he could receive, it does not follow that every potential consequence brought to the defendant's attention is an element of punishment. *See Cucciniello v. Keller*, 137 F.3d 721, 725 (2d Cir. 1998) (recognizing that some "substantial consequences" of a guilty plea are not part of punishment and thus need not be noticed before the plea is taken, but suggesting that judicial officers might nevertheless find it advisable to give such notice).

B. Punishment in Fact

Next, is must be determined whether the statute, though intended to be regulatory or nonpunitive, is nevertheless so punitive in fact as to violate the ex post facto prohibition. This question is highly context specific. *See Doe*, 120 F.3d at 1275. Moreover, the plaintiff has a heavy burden of showing by "the clearest proof" that the statute is so punitive in form and effect as to render it criminal despite the legislature's intent to the contrary. *See Doe*, 120 F.3d at 1274. "[F]or the effects of a measure to render it 'punishment,' those effects must be extremely onerous. . . . The only examples the case law suggests of effects sufficiently onerous are deprivation of one's United States citizenship that leaves one a 'stateless person' and a complete deprivation of personal freedom (i.e., incarceration)." *E.B. v. Verniero*, 119 F.3d 1077, 1101 (3d Cir. 1997).

To guide inquiry at this stage, the Supreme Court and the Second Circuit have considered the factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), while recognizing that those factors are neither exhaustive nor dispositive. *See Doe*, 120 F.3d at 1275 (citing *Ward*, 448 U.S. at 249)).[28] Both courts have also recognized that the factors often point in different directions. *See Mendoza-Martinez*, 372 U.S. at 168; *Doe*, 120 F.3d at 1275.

[28] The *Mendoza-Martinez* considerations are whether the sanction (1) involves an affirmative disability or restraint, (2) has historically been regarded as a punishment, (3) comes into play only on a finding of scienter, (4) will promote the traditional aims of punishment – retribution and deterrence, (5) applies to behavior that is already a crime, (6) may rationally be connected to an alternative, nonpunitive purpose, and (7) appears excessive in relation to that alternative purpose.

Plaintiff contends that two of the *Mendoza-Martinez* factors show the CT-SORA to be punitive in fact: (1) the statute's registration requirements are triggered solely by the offender's conviction; and (2) Internet availability of registry data is unnecessary to achieve the statute's stated remedial purposes. Neither of these factors by itself, nor the two in combination, establishes by the "clearest evidence" that the law is punitive in fact.

Tie to criminal conduct The fact that the statute's registration requirements are triggered by an offender's conviction does not establish that the law is punitive in fact. *Doe* recognizes that such a trigger is common to all regulatory disabilities that follow from a prior conviction, such as the loss of the right to vote. *Doe* also recognizes that disabilities challenged under the Ex Post Facto Clause and upheld by the Supreme Court in several cases were triggered solely by a prior conviction. *See Doe*, 120 F.3d at 1281 (citing, among other cases, *Hawker v. New York*, 170 U.S. 189, 196-97 (1898) (upholding law under which felony conviction was conclusive evidence of lack of fitness to practice medicine)).[29] *See also Cutshall v. Sundquist*, 193 F.3d 466, 476 (6th Cir. 1999) ("[A]lthough the registration and notification provisions are intertwined with the offender's underlying conviction, they impose no additional penalty. . . . "). Even in plaintiff's main case on this point, *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), the tie between

[29] *Hawker* establishes that it is permissible to use a conviction as conclusive evidence that a sanction should apply, contrary to plaintiff's suggestion that the conviction may be used only as evidence in a subsequent proceeding.

the sanction and criminal conduct was only one of the several factors that led the Supreme Court to conclude that the sanction was punitive. *See id.* at 780-83. Elsewhere the Court has found such a link insufficient to establish unconstitutionality. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365-66 (1984); *Ward*, 448 U.S. at 250.[30]

Excessiveness Plaintiff's argument that Internet dissemination is excessive relative to the goals of public safety and assisting law enforcement has some force. Connecticut's web site makes more information available to more people than is necessary to achieve its public safety and law enforcement goals.[31] Because Connecticut does not conduct an individualized assessment of each registrant, the web site conveys information about people who present either no risk or only a low risk of reoffending. Moreover, because the Internet is a global medium, the web site makes information available to millions of people who will never come to the state or otherwise come into contact with a registrant. As a result, Connecticut's approach is significantly different from the "occasionally

[30] It bears noting that application of the CT-SORA is not conditioned on scienter or a finding of criminal culpability. The CT-SORA applies not only to people who plead guilty to a covered offense or are convicted after trial, but also to people who plea nolo contendere or are found not guilty by reason of mental disease or defect. *See* C.G.S. §§ 54-250(1); 54-251; 54-252; 54-253; *see also Hendricks*, 521 U.S. at 362 (finding significant the fact that people absolved of criminal culpability were still subject to the statute).

[31] Defendants do not dispute that their web site also exceeds the availability requirements of the federal statute, which mandate that information be released only "where it is necessary to protect the public concerning a specific person." 42 U.S.C. § 14071(e)(2).

imprecise targeting" that *Doe* ascribed to the New York statute. *See Doe*, 120 F.3d at 1282.

Nevertheless, I am not convinced that Connecticut's use of the Internet to disseminate registry data makes the CT-SORA punitive in fact. There can be no doubt that Internet availability of registry information is rationally related to the goals of public safety and law enforcement. *See Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000). Indeed, use of the Internet is the most effective means of making the information available to residents of the state, and it will become more efficient as Internet accessibility increases over time. Because use of the Internet furthers these nonpunitive purposes, this feature of the CT-SORA is insufficient to render the statute punitive in fact. *See United States v. Ursery*, 518 U.S. 267, 290 (1996) ("Most significant is that [the challenged statutes], while perhaps having certain punitive aspects, serve important nonpunitive goals."); *E.B. v. Verniero*, 119 F.3d 1077, 1097 (3d Cir. 1997) ("The relevant issue is whether [the notification provisions] are reasonably related to a legitimate goal.").

Plaintiff contends that Connecticut has an obligation to more closely tailor its notification system to the statute's regulatory purposes, relying principally on *Femedeer v. Haun*, 35 F. Supp. 2d 852 (D. Utah 1999), which addressed a Utah web site providing Internet access to that state's registry.[32] The district court's decision in *Femedeer*

[32] Plaintiff's invocation of "other contexts" in which the Supreme Court has required that a sanction be more closely tailored to an individual's dangerousness is unpersuasive. *See* Pl.'s Mem. at 36. Each of the cases plaintiff cites involved physical detention or confinement.

has been reversed since plaintiff filed his memorandum. *See Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). Rejecting arguments very similar to those plaintiff makes here, the Tenth Circuit noted that "the district court [had] failed to consider . . . that. . . . the farther removed one is from a sex offender's community and from Utah generally, the less likely one will be to have an interest in accessing" the Utah registry. *Id.* at 1253. The Tenth Circuit also accepted a significant degree of imprecision in Utah's system, declining to require a more rigorous risk assessment mechanism. *See id.* ("[A] statute is not necessarily excessive . . . simply because a state has perhaps not achieved a perfect fit between ends and means.").

Other Factors None of the other *Mendoza-Martinez* factors supports a finding that the CT-SORA is punitive in fact. The burdens of registration and ongoing address verification are not the type of affirmative disability or restraint suggestive of a punitive sanction. *See Cutshall*, 193 F.3d at 474 ("The first [*Mendoza-Martinez*] factor, an affirmative disability or restraint, is some sanction approaching the infamous punishment of imprisonment." (citation and internal quotation omitted)); *cf. Hudson*, 522 U.S. at 104 (rejecting petitioner's affirmative disability argument as nothing approaching the 'infamous punishment' of imprisonment" (internal quotation omitted)). As *Doe* pointed out, the Supreme Court has upheld civil sanctions with burdens must more onerous than those at issue here. *Doe*, 120 F.3d at 1279 (citing, inter alia, *Hendricks v. Kansas*, 521 U.S. 346 (1997) (upholding involuntary civil commitment sanction against an Ex Post Facto Clause challenge); *see also Seling v. Young*, 121 S.Ct. 727 (2001) (rejecting an "as applied" challenge to Washington's civil commitment statute).

Also, contrary to plaintiff's suggestion, "the fact that notification serves to deter sex offenders, both specifically and generally, from committing crimes in the future is not indicative of punitiveness." *Doe*, 120 F.3d at 1283; *see also Hudson*, 522 U.S. at 105 ("To hold that the mere presence of a deterrent purpose renders . . . sanctions 'criminal' for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation. . . . ").

Aggregate assessment Only two of the *Mendoza-Martinez* factors arguably indicate a punitive effect: the tie to criminal conduct and the excessiveness of the sanction relative to nonpunitive purposes. Neither one by itself is sufficient to overcome the legislature's nonpunitive intent. *See Hudson*, 522 U.S. at 101 (rejecting the Supreme Court's apparent prior elevation of the excessiveness factor to dispositive status); *One Assortment of 89 Firearms*, 465 U.S. at 365-66 (holding that a punitive indication from the tie-to-criminal-conduct factor does not alone establish the necessary "clearest proof"); *Ward*, 448 U.S. at 249-50 (same). Nor does the combined effect of these two factors suffice to establish by the clearest proof that the law is punitive in fact. Accordingly, defendants' motion for summary judgment on the ex post facto claim is granted.

Conclusion

In accordance with the foregoing, plaintiff's motion for summary judgment on the due process claim is granted and his motion as to the ex post facto claim is denied. Defendants' cross-motion for summary judgment as to the stigma aspect of the due process claim is denied and their cross-motion as to the ex post facto claim is granted. The ex post facto claim is dismissed.

So ordered.

Dated at Hartford, Connecticut this 31st day of March 2001.

/s/
Robert N. Chatigny
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN DOE	:	No. 3:99CV314 (RNC)
Plaintiff	:	
vs.	:	
PUBLIC SAFETY	:	HARTFORD, CONNECTICUT
Defendant	:	MAY 15, 2001

HEARING ON MOTIONS

BEFORE:

HON. ROBERT N. CHATIGNY, U.S.D.J.

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Darlene A. Warner, RDR-CRR
Official Court Reporter

[2] 2:00 P.M.

THE COURT: Good afternoon. This is the case of Doe v. Lee. The defendants requested an opportunity to present oral argument on pending motions.

Would you please state your appearances?

MS. SADIN: Yes, sir. Shelley Sadin and Phil Tegeler representing John Doe, plaintiff.

MR. BLUMENTHAL: Richard Blumenthal, Attorney General, with Assistant Attorneys General, Peggy Chapple and Henry Alexander for the State.

THE COURT: Thank you.

The defendant's motion for oral argument is granted.

By way of housekeeping, there is a pending motion on consent, filed by the plaintiff, for permission to file a reply brief in excess of ten pages, which is also granted.

The motions with respect to which argument is desired are the plaintiff's motion for class certification, plaintiff's motion for a preliminary injunction in favor of John Doe, plaintiff's motion for declaratory judgment, Preliminary and permanent injunction in favor of the due process class, and the plaintiff's motion for an order which relates to the ex post facto claim.

I leave it to you to address these in whatever order you wish. Since these are the plaintiff's motions, [3] we'll start with counsel for the plaintiff.

MS. SADIN: Thank you, sir.

As the Court knows, all the parties have fully briefed each one of these motions so I don't want to belabor the points that have already been made in them. I want to be able to answer any questions the Court has and respond to any points that Mr. Blumenthal makes.

I want to be clear though, Your Honor, that the class relief for which we're asking, first of all, would obviate the need for any individual relief for the plaintiff. I also want the Court to understand that we are not asking in the relief of class that the registry be undone or dismantled in any way. We're likewise not asking that there be any restriction on public access to public records; that is to the conviction records of the people who are required to register.

The relief for which we are asking on behalf of the class, Your Honor, is tailor made for the ruling which Your Honor already has entered in favor of the plaintiff, John Doe. And that is that the public disclosure of the undifferentiated registry cease. That addresses the point, Your Honor, that relief for the individual and the relief for the class really are the same. We're not asking for anything different. And I tried to demonstrate that the relief we've requested is limited.

[4] With respect to class certification, I think our papers have demonstrated amply that the Court has sufficient basis on which to make the requisite findings under Rule 23(a)1 through (a)4 and (b)2. And for all the

reasons that we've stated in our briefs, the class should be certified.

With respect to, and I may be jumping around a bit too much. I'm happy to answer any questions as we go along. I think one of the things we're most concerned about today, Your Honor, is the State's request that there be an alternative to the requested injunctive relief. We'd like to emphasize that the suggestion made by the State is insufficient to address the constitutional problem that we brought before the Court and to which Your Honor has found.

The disclaimer on the sex offender registry website simply repeats what we all know, which is that no assessment of dangerousness has been made with respect to any registrant. That being said, it doesn't change the fact that the list – an undifferentiated one on which people who have claims that they are not dangerous nonetheless are forced to register without having the opportunity to show they're not dangerous – cannot be changed. All the disclaimer says is that no dangerous assessment is made, which we all know.

I would urge the Court that the modification [5] order, stay order, which the State alternatively requests would not meet the standards of Rule 262(c), which Your Honor has decided on that there is no irreparable harm to the defendants. I emphasize that it must be irreparable. Unlike the harm which the Court must weigh with respect to the plaintiff, which is substantial, there is no irreparable harm to the defendant. There will be no dismantling of the registry; there will be no effect on the public disclosure of conviction records, which are public records; and there

will be no order rendering the registry itself unavailable to law enforcement.

There will, on the other hand, be substantial harm to the plaintiff and to the plaintiff proposed class, particularly, Your Honor, those people who within the next weeks and months will be required to register either because they are convicted – and that includes in federal court – either because they are convicted of offenses requiring registration or because they've already been convicted and have finished serving sentences and will be released and therefore will have to register.

Those people, Your Honor, have never had their names disclosed on this registry. And with respect to them, if a stay is entered, they will be irreparable, not just substantial but irreparable. Because for the first time they will be placed on that list, a list on which Your Honor [6] has already recognized is constitutionally infirmed.

THE COURT: To be clear, with regard to those individuals, are you asking me to enter an order that would prohibit their inclusion in the list or –

MS. SADIN: No, sir.

THE COURT: – or the public dissemination of a registry containing their information?

MS. SADIN: That's correct. It is the latter.

THE COURT: How would you define "public disclosure" to achieve the objective that you seek?

MS. SADIN: Any and all. That means that the list – the registry would not be available at police departments. It would not be disclosed on the website. It would

not be publicly available anywhere. It would be made available to law enforcement but not to members of the public. And again, Your Honor, what I want to emphasize is that that does not restrict the availability of the list to law enforement, nor does it restrict the availability of public records to the public. Conviction records are public now; they have been public; they will remain public no matter what order this Court enters with respect to the register.

I won't belabor the point about whether or not the defendants are likely to succeed on the merits. I think we've shown there are no additional arguments or anything [7] raised that undermine anything that was in Your Honor's March 31st ruling.

THE COURT: Let me ask you a question to follow up on your comments in response to my last question.

I asked you how you would define "public disclosure" to satisfy your concerns. And you said "any and all public disclosure would be prohibited."

MS. SADIN: Yes, sir.

THE COURT: Suppose a law enforcement officer with access to the registry were to remove a page from the registry in connection with the investigation of an offense and show it to witnesses or potential witnesses, would that be prohibited?

MS. SADIN: I think that would be in connection with his or her law enforcement duties. I would expect that any defense counsel or anybody defending the case would want to be sure that whatever the disclosure that's made, would be consistent with only what is necessary to

prepare the case for court or to perform the officer's public duties.

But I hesitate to say that that would violate the order. I don't think it would. Because that seems to be simply in keeping with law enforcement duties.

But again, I would want to be sure that whoever – I don't want to step on future defense counsel's toes. I [8] would want to be sure that whatever disclosure is made, is something that is supervised by a court and that everybody knows exactly who is obtaining the information.

THE COURT: You haven't challenged the State's right to collect the information?

MS. SADIN: No.

THE COURT: Nor have you challenged the State's right to maintain it in this form.

MS. SADIN: Correct.

THE COURT: You have challenged the public dissemination, the indiscriminate publication of the information to members of the public.

MS. SADIN: Yes, sir.

THE COURT: In my hypothetical, our law enforcement officer has taken a page from the registry that depicts an individual's likeness and provides his name, his address and other identifying data, and he is using it in connection with an investigation.

MS. SADIN: That seems consistent with his duties and that would not be in violation of any injunction that we requested.

THE COURT: All right. I don't want you to think that I'm trying to create needless difficulty here, but I think it's very important that we have a clear understanding.

[9] MS. SADIN: Yes, sir.

THE COURT: Let's suppose that an offense is committed tonight in City-A and the investigating officers go to the registry to determine the names and addresses of people who have been convicted of offenses in City-A and they find that some number of them live not far from the victim in this latest case, would they be able to take pages from the registry containing their photographs and identify information of those individuals and publish them to the victim and potential witnesses in the course of the investigation?

MS. SADIN: The answer is yes, as long as the information is in a form which does not make it evident that those people are included on an undifferentiated registry which includes everyone.

So that, for example, Your Honor, I think they'd be able to examine and to interview witnesses using the information but I wouldn't want it to be evident that it's part of the sex offender registry. But I don't think there would be any limitation on the officer's access to the information or using the information to conduct their investigation.

THE COURT: All right. And you think that language like the language you suggested a few minutes ago would be appropriate for me to use? That is to say, [10] language prohibiting any and all public disclosure of the registry?

MS. SADIN: Maybe "public dissemination" is a better word. I think Your Honor is correct about being very careful about the use of the language.

I would say, though, that any public – any and all public disclosure of the registry in its current form, the answer would be yes. And I don't think that – again, I don't think that would limit police officers in any of the respects that we've discussed just now.

THE COURT: All right. Thank you.

MS. SADIN: Thank you, sir. And one point on Rule 62 is that from the plaintiff's perspective and I think from the public's perspective, the public interest weigh very heavily in favor of this Court exercising its authority and its duty to enforce federal constitutional rights.

THE COURT: All right, thank you.

MR. BLUMENTHAL: Thank you, Your Honor.

First, my thanks to the Court for permitting this opportunity to be heard in response to a request. And as Ms. Sadin has so ably been, I will try to be brief or as brief and to the point as well and not repeat what is already in our papers.

Let me begin with Your Honor's comment somewhat [11] apologetically that the Court didn't mean to create needless difficulty. The difficulties that you have suggested, and may I say respectfully, merely suggested because there would be a raft of very serious difficulties in framing an order relating to disclosure, dissemination, however the Court wishes to characterize what would be prohibited – it would be a very difficult and dangerous

task. And that is really the point that we would like to stress today.

There are a variety of legal and practical difficulties and dangers that are suggested by the kind of order that is being sought here. And we would suggest, with all due respect, that a hearing would be necessary in order to present factual evidence.

Just to suggest some of the factual points that might come before the Court, there are now about 2,075 individuals who are part of the sex offender registry. Of those, approximately 1641 are in compliance with registration requirements. And of those now registered, 337 currently are reincarcerated on other charges. I can't represent to the Court exactly what charges, whether they are reoffenses in connection with sex offense crimes, but may I just suggest to the Court that the high reoffense rate is an aspect of the danger and the difficulty that this Court would confront in framing an order that really, in our view, is a disservice to the public interest but also [12] unnecessary to the goal of having the Court of Appeals review the Court's ruling here as soon as possible; that is a goal that we all share.

THE COURT: What do you do with my considered decision that the plaintiff's complaint, based on the due process clause, is well founded? I have an obligation under my oath of office to see to it that the violation of the plaintiff's rights is stopped and that others who are similarly situated are likewise protected. And whatever difficulties and dangers might arguably arise from that are matters that I had hoped I had given you and plaintiff's counsel full and fair opportunity to address, discuss, and disclose to me.

I can't, consistent with my obligations, ignore the continuing violation of the plaintiff's rights nor the continuing violation of the rights of similarly situated persons.

If the Court of Appeals should determine that I am mistaken, then so be it. But I am bound to discharge my obligations consistent with my oath, and it's not my job to predict what the Court of Appeals might or might not decide months from now. It's my job to deal with the violation that I have found.

Any suggestions from your office as to how best to serve that objective without needlessly burdening any other [13] legitimate interests would be more than welcome.

MR. BLUMENTHAL: Well, we do have a suggestion, which is one that we have alluded to before.

We recognize, to be very blunt, that a Court of Appeals ruling upholding Your Honor's opinion, even if we think it is mistaken, as we do, would apply to the entire list of individuals who are currently part of the sex offender registry and there would have to be some process made available to those individuals, some opportunity to be heard, and some consideration of dangerousness. So whether it is by way of stipulation or agreement or representation, we recognize that we would be bound as to all of those individuals even if John Doe were the single plaintiff before the Court of Appeals and before this Court. And we're willing to stipulate to that fact.

Second, at the moment, John Doe is the only plaintiff and an order as to him would uphold his rights and would fulfill the responsibility raised by Your Honor as to the

process that he is due; and it would avoid the need to undertake class certification, which, again, in our view, with all due respect, is simply a formality as it was in some of the cases that we've cited, using that word, "a formality" because we recognize that Your Honor's reasoning and ruling applies to that class of people even if they aren't certified as a class.

[14] Put aside the difficulties we raise as to numerosity and commonality and typicality and all the criteria that are commonly usually raised as to class certification, we think it is needless, time consuming, burdensome. We haven't raised the issues of notice that would be entailed, the possibility of opt outs and then the difficulty of and danger of framing an order as to the class. And of course we would seek a stay of that order, because we do believe that the public interest would be in danger.

Your Honor raised a hypothetical of a crime already committed that is under investigation. What about a sex offender moving across from a school? One who has been convicted not of one crime but of a number of crimes in City-A. The statute would seem to place an obligation on the local police having been notified of that fact to warn someone. That is the reason for Megan's law in the first place. Nobody was warned. Nobody was made aware of that fact. And it led to that needless tragedy which both federal and state legislatures have sought to prevent from recurring to the extent they can.

THE COURT: That hasn't been the subject of the complaint or this litigation.

MS. SADIN [sic]: Well, it has to – it has, Your Honor, to the extent that the pleading has said that

the [15] class would consist of non-dangerous people whose rights are impaired by the non-differentiation.

THE COURT: But the plaintiff hasn't claimed, to my knowledge anyway, that his due process rights were violated by proactive disclosure of his registry information to school authorities or other people. That's a far cry from his complaint.

What he's saying is, no, that indiscriminate public disclosure and broad public dissemination of his registration information without giving him an opportunity to be heard on the issue of dangerousness violates his due process rights.

My point is, Mr. Attorney General, is I don't know why an order along the lines requested by the plaintiff would inhibit, much less prevent, a law enforcement official from taking proactive measures in the circumstance you describe.

MR. BLUMENTHAL: Well, I am reassured by what Your Honor says except that any and all disclosure, any and all dissemination? If it refers in some way to the sex offender registry. The local police are not even before the Court, and Your Honor's order presumably would pertain to them. They're not represented here. That may seem like a technical issue, but they might have arguments of their own relating to the practical issues of using their [16] registry without disclosing that it's a registry. How are answers to questions going to be framed by local citizens, parents, educators and so forth?

I think that the Court's – and I don't mean to prolong this discussion because it is in the nature of hypotheticals – but the point is that the Court could avoid many of these

difficulties and dangers by simply having the relief pertain to John Doe; giving both sides the opportunity to appeal as quickly as possible; and then having the Court of Appeals opinion, whatever the outcome, form the ultimate –

THE COURT: I grant you that sounds like an easy way to proceed, easy in the sense that it avoids some of the complications that you emphasized. However, it has the singular, and, in my view, unacceptable disadvantage of requiring me to ignore the ongoing violation of the rights of similarly situated persons.

You have said that my ruling applies across the board and that you would honor it if and when the Court of Appeals affirms. But in the meantime you would disregard it, I gather, and thus the rights of others would be violated, in my opinion, and with my acquiescence, until such time as the Court of Appeals renders its decision.

I simply can't agree to do that. And in that context, I would like to have a meaningful, productive [17] exchange about how to avoid unnecessary and unwanted difficulties.

It seems to me that we have that opportunity and we should use it. I would like to frame an order that is no broader than unavoidably necessary to prevent the continuing violation of this plaintiff's rights and the rights of people who are similarly situated. And Ms. Sadin suggests that the plaintiff is looking for an order that prohibits any and all public dissemination of the registry information in its current form, by which I think she means to say "displaying to members of the public the body of information contained within the registry which includes registry information concerning persons who have not been given an opportunity to address the question whether they are currently dangerous."

In other words, and Ms. Sadin, I don't want to discourage you by continuing to talk, you're welcome to pitch in. But just to complete the thought, it's my understanding that the plaintiff does not seek an order preventing a law enforcement officer from copying somebody's registry information and using it in the course of an investigation. Nor, as I understand it, does the plaintiff seek an order that would prevent the kind of proactive notification that you spoke about a minute ago with a person moving across from a school.

[18] What the plaintiff does object to, and I think for very good reason, is giving the public the registry. And in that way conveying to the public the message that any particular person whose registry information may be found within their registry is currently dangerous without giving that person an opportunity to be heard on that subject.

So I don't want to minimize and I certainly don't want to overlook any valid concerns. I think we should take them into account. But it seems to me if that's what the plaintiff is looking for, the things that may concern you most urgent might not be concerns at all.

MS. SADIN: If I may, Your Honor, that is what the plaintiff is looking for with one very small change. The word "dissemination" concerns me a bit because it implies some sort of proactive dissemination as opposed to just disclosure, even disclosure. If a member of the public would come to a station and ask for the registry, that should be covered as well.

THE COURT: Correct. I think I understand your position.

What you are asking me to do is stop the current practice.

MS. SADIN: Yes, sir.

THE COURT: You're not asking me to interfere with investigations; you're not asking me to interfere with [19] the State's ability to engage in proactive notification in the circumstance that the Attorney General describes. What you're asking me for is an order that prevents the State from continuing the current practice.

MS. SADIN: The current practice which Your Honor has found to be unconstitutional.

THE COURT: Correct. That's my understanding.

MS. SADIN: Yes, sir.

THE COURT: So the registry that is currently sitting on the desk in a police department where members of the public can come and peruse it would have to be removed from public access; the website would have to be taken down; but the State could continue to use the registry information for law enforcement purposes and continue to collect the information.

MS. SADIN: All, correct, sir.

THE COURT: Is that helpful?

MR. BLUMENTHAL: To me?

THE COURT: Does it help clarify the situation?

MR. BLUMENTHAL: Well, it clarifies it – I guess the simple answer is no. Yes, theoretically; and, abstractly, no, for the purpose of actually working as a

police officer, whether local or state police out in the field confronted with a dangerous situation, a person who is thought to be dangerous and then what use to make of [20] that information and how to use it.

I simply think, Your Honor, that a ruling of this kind creates grave perils, tremendous uncertainties, profound repercussions for law enforcement resulting from the need to rework a system in a way that is unnecessary to protect the rights at stake here; which are, at the moment, are only the plaintiff's before this Court.

THE COURT: If you accept for purposes of our discussion today that the order would require no more than and no less than what I just said, the registry comes off the counter at the police department and the website comes off the internet but nothing else is prohibited – not the use of the information by the investigator investigating a crime, nor the use of the information by a person in your hypothetical who is concerned about the children at a school – please give me an example or two of the kinds of dangers that you have just referred to.

MR. BLUMENTHAL: Well, let me just –

THE COURT: Assuming nothing else changes, what dangers do you contemplate?

MR. BLUMENTHAL: I would contemplate dangers in the event of public inquiries, in the event of proactive notification. Can a police officer take information that's presented from law enforcement authorities of other states, as frequently happens? Photographs? Can the police [21] officer respond to the inquiry of whether someone is on the registry? Can he say that someone is on the registry? I can think of a lot of hypothetical situations that

would occur to me as I stand here, although I must confess to Your Honor, I wasn't prepared to speak about the full range of hypotheticals, but I'm not out there day-to-day dealing with these issues. And what I would see as one practical danger is that law enforcement would be inhibited by an order that wasn't fully understood even with the best of intentions from this Court.

Now, having said all that, I want to come back to what Your Honor raised initially, which is the offer of a meaningful or constructive conversation, which I hope we're having here, and I would be happy to continue obviously in a more private setting if counsel for the plaintiff wanted to engage in it. We don't mean to sort of just reject all consideration. But I must say also that obviously the legislature has to be involved in this kind of conversation because ultimately it is the legislature's decision as to what kind of process there needs to be if the ruling is upheld by the Court of Appeals, and we would need to consult with the State Police and other law enforcement.

But in direct answer to your question, I can think of a lot of hypotheticals that would raise very grave dangers if I tried to think out the practical difficulties.

[22] THE COURT: Well, I've been trying to think of them. And with the clarification that we have today from plaintiff's counsel, I am more optimistic that an order can be entered that protects the rights of John Doe and others like him without risking the sorts of dangers that one would naturally rightly be concerned about.

I don't think that we risk any particular danger in the hypotheticals that have been described today. And as long as the information is available to be used in investigations

and proactively, I don't know why there should be any such danger.

But I don't claim to be omniscient and I think that your input would be very helpful, and I would like to have some further discussion, perhaps not right now. But, certainly, if there are real valid concerns about public safety that need to be addressed, we should do that, of course.

MR. BLUMENTHAL: Well, I think there are, Your Honor, real valid and pressing public concerns about public safety.

You know, to give more hypotheticals, what if there were dissemination of information in the media about someone who was at large who was thought to have committed a crime whose picture might be available? What would be the implications for the freedom of information act if access [23] were sought to this information by a member of the media? How can this kind of ruling be reconciled with the State's obligations under the federal law? And what availability has to be maintained? Because the clear intent of federal law was that it should be disseminated, in our view.

So I think there are legal and practical difficulties and dangers here that the Court could avoid by simply permitting the parties to go forward with their appeal on John Doe.

And, you know, I apologize for repeating myself. I recognize that the Court is – has given us this opportunity and I thank you.

THE COURT: All right. Thank you.

Anything further?

MS. SADIN: Very briefly, Your Honor. The Wetterling act to which we just referred, states that the state shall, this is 42 U.S.C. Section 14071(e)2, "The state shall release relevant information that is necessary to protect the public concerning a specific registrant." That would not be unfair with the order contemplated by Your Honor.

THE COURT: Mr. Blumenthal, with regard to the motion for class certification, the defendants have opposed class certification and today you have expressed the view that were the Court of Appeals of a mind to affirm, then [24] the defendants would of course extend the benefit of the ruling to all similarly situated people without the need for class certification.

If I had that commitment from you effective now, I suppose class certification might not be necessary. I don't know what the plaintiff's final position would be in that regard. But without that, I don't know how I can avoid the class action aspect of the case without abdicating my responsibility.

If your position is that absent class certification, other similarly situated persons will not get the benefit of the ruling unless and until the Court of Appeals affirms it, then I think I need to grant the motion for class certification. If I'm misunderstanding you, then maybe I don't need to grant the motion for class certification. Do you follow my question?

MR. BLUMENTHAL: I think I follow the question and the answer is as Your Honor has stated our

position, you've stated it correctly; that is, unless and until the Court of Appeals affirms, we would not recognize the ruling as applying to all 2,000 people who are currently part of the registry.

THE COURT: All right, fine. I appreciate that clarification. Then I intend to grant the motion substantially for the reasons stated by the plaintiff in [25] his memorandum of law. And I will have to fashion an order that provides relief.

The plaintiff has asked for declaratory judgment as well as an injunction. I'm going to ask you to confer with each other about the terms of the declaratory judgment and the injunction that should enter given my decision granting the motion for class certification and my ruling on the due process issue.

I give you that opportunity in order to be sure that you have full and fair opportunity to influence the shaping of the judgment.

How much time would you like to have to work on that? I'd like to do something in the next couple of days.

MS. SADIN: Yes, sir, I think we could fashion an order within the next couple of – and discuss the matter with the State, which I take it is the Court's intention.

MR. BLUMENTHAL: Your Honor, I don't mean to leave any mis-impression with the Court, we would do our best to inform or assist the Court, as we feel we have an obligation to do, as any litigant does, in reaching a just and fair result. At the same time, I should inform the Court that we will ask the Court for a stay of that order and we will also seek a stay from the Court of Appeals in

the event it should be denied here. So I don't want to leave any confusion on that point.

[26] We're happy to make available whatever expertise and knowledge we can from State Police and others, but at the same time, we don't mean to suggest we're going to be submitting a joint order on which we agree and are content to accept.

THE COURT: I understand.

To sum up, I've made a ruling granting the plaintiff's motion for judgment on the due process claim, denying its motion on the ex post facto claim. Having come to that decision, it's my obligation to see to it that the violation stops. And I need to extend the benefit of my ruling to similarly situated persons.

The declaratory judgment and the injunction should be no broader than necessary to provide the relief that we have discussed. In other words, getting the registry off the shelf where it's publicly available at the police department and taking down the website, until such time as people are given notice and an opportunity to be heard on the issue of whether they are currently dangerous.

If they are not, then, in my opinion, the communication is defamatory. If they are, then dissemination of the information serves the purposes of the law.

I don't want to over-step the bounds of judicial authority. I don't want to usurp the rights and [27] prerogatives of the political branches of the state government. If I'm right, then I would hope and expect that the State would do as Mr. Blumenthal said. And in the meantime, I would ask only that the State cooperate to the point of telling plaintiff's counsel whether there is something about the

proposed judgment to which the State has some specific objection that could be ameliorated now without waiting any litigating position on the part of the State and for no purpose other than to be sure to avoid unnecessary problems while doing what I must do, which is prevent an ongoing violation of this plaintiff's rights as I see it and a violation of the rights of similarly situated people, which is my job.

All right. So I would like to have something by the end of the day on Thursday.

MS. SADIN: Yes, sir.

THE COURT: All right?

MS. SADIN: Your Honor, if we could make it midday on Friday? I'm actually out of town all day tomorrow.

THE COURT: All right. Then shall we day 1:00 on Friday?

MS. SADIN: Yes, sir.

THE COURT: Is there anything further?

MR. BLUMENTHAL: Not from the State, Your Honor.

[28] MS. SADIN: No, sir.

THE COURT: Thank you.

(Proceedings adjourned at 2:50 p.m.)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, Plaintiff,	:	
V.	:	CASE NO. 3:99CV314 (RNC)
DR. HENRY C. LEE, ET AL. Defendants.	:	

RULING AND ORDER GRANTING
PERMANENT INJUNCTION

For reasons more fully stated in a ruling and order on cross-motions for summary judgment dated March 31, 2001, the Court has determined that public disclosure and dissemination of plaintiff's inclusion in the sex offender registry maintained by the defendants pursuant to the Connecticut sex offender registry act, Connecticut General Statutes §§ 54-250 *et. seq.* (the "Registry" and the "Act") violates plaintiff's rights under the Due Process Clause of the Fourteenth Amendment. Plaintiff has been included in the registry, not because he has been determined to pose a threat to public safety, but solely because he has been convicted on one of the numerous offenses enumerated in the Act. Plaintiff has a liberty interest in not being falsely labeled a dangerous sex offender – a label inherent in his inclusion in the undifferentiated registry. Defendants have deprived him of that interest without providing him notice and an opportunity to be heard on the question whether he is dangerous.

The Court has granted plaintiff's motion to certify a class of all persons who are subject to the registration and public disclosure requirements of the Act without notice and an opportunity to be heard on the question whether

they are dangerous (the "due process class"). Class certification is appropriate under Rule 23(b)(2) of the Federal Rules of Civil Procedure because the requirements of numerosity, commonality, typicality, and adequacy of representation are satisfied and defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

Accordingly, it is hereby ordered:

Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participating with them who receive actual notice of this order, are permanently enjoined from:

1) disclosing or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class if the information identifies the class member as being included in the Registry; and,

2) identifying any member of the due process class as being included in the Registry;

provided that nothing in this order shall

1) impair access to the Registry by law enforcement agencies and officers, including but not limited to the Connecticut Department of Correction, Board of Pardons, Board of Parole, Court Support Services Division, and Division of Criminal Justice;

2) preclude law enforcement agencies and officers carrying out official duties from using information contained in the Registry in specific criminal investigations and prosecutions, so long

as members of the due process class are not described to the public as being included in the Registry;

3) preclude law enforcement agencies and officers carrying out official duties from disclosing or disseminating to the public information necessary to protect the public concerning a specific person, so long as members of the due process class are not described to the public as being included in the Registry; or

4) affect the public's ability to obtain individual criminal conviction history records pursuant to Connecticut General Statutes Sections 1-210 *et seq*. and 29-11 *et seq*.

Defendants are directed to serve a copy of this order on each local police department, law enforcement agency, or other state or local entity to which they have transmitted the Registry or Registry information. Each such department, agency, or entity is bound by this order.

Pursuant to this order, but without limitation of it, defendants shall immediately take down the Registry website and cease making publicly available the Registry information maintained pursuant to C.G.S. § 54-258(a)(1) at the Department of Public Safety and at local police departments and state police troops.

This order is a statement of federal law that supersedes any state law to the contrary, including without limitation the Connecticut Freedom of Information Act.

So ordered.

Dated at Hartford, Connecticut, this 17th day of May 2001.

/s/ _____
Robert N. Chatigny
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

JOHN DOE	x	No. 3:99CV314 (RNC)
Plaintiff	:	
vs.	:	
PUBLIC SAFETY	:	HARTFORD, CONNECTICUT
Defendant	:	MAY 18, 2001
	x	

TELEPHONE CONFERENCE

BEFORE:

HON. ROBERT N. CHATIGNY, U.S.D.J.

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CAROLYN QUERIJERO, DEPUTY AG

Darlene A. Warner, RDR-CRR
Official Court Reporter

[2] 9:00 A.M.

THE COURT: Good morning. Would you please state your appearances for the record starting with plaintiff's counsel?

MS. SADIN: Yes, sir, Shelley Sadin appearing for John Doe. Mr. Tegeler is not available this morning, sir.

THE COURT: Thank you.

MS. CHAPPLE: Barbara Chapple, Assistant Attorney General for the defense. And with me is Associate Attorney General Greg D'Auria, Deputy Attorney General Carolyn Querijero, Henry Alexandre, Assistant Attorney General, and Maura Fitzgerald.

THE COURT: I wanted to speak with you first thing this morning if possible to attend to the matters that need to be addressed in the Doe case. I know that we had spoken about doing something around midday today or perhaps somewhat later than that. However, in light of the correspondence that I received late yesterday from both sides, it seemed to me best, indeed, absolutely necessary, to proceed at the earliest opportunity. Accordingly, I appreciate your being available at this hour.

The plaintiff's submission tells me that the defendants have said they would like additional time to consider the order that has been proposed by the plaintiff and to make additional comments. Is there anything more [3] that the defendants would like to say?

MS. CHAPPLE: Not at this time, Your Honor. I think any comments that we've had we've already included or we've conveyed them to the plaintiffs and they've

been included in the proposed order. We don't intend to submit anything further.

THE COURT: All right, fine.

MS. SADIN: If Your Honor please, one thing had occurred to me that I think we need to attend to, and that is that the defendants have already disclosed and provided copies of the registry to agencies and officers and I think we need to I don't think that this order really covers that.

For example, when Your Honor mentioned the other day that one of the ways that the – that we need to address the disclosure issue is to take the registry off the desks at the police department. I'm not sure that the way we've worded the order so far accomplishes that.

THE COURT: We've addressed that.

MS. SADIN: I think we need to add a clause.

THE COURT: We've done that. And before we've through, I'll read what we have and I'll make this available to you so that you can pick it up.

MS. SADIN: Okay.

THE COURT: All right?

[4] I know the Attorney General's office is just around the corner and it's very easy for the defendants to get access to this order. It may not be quite as easy for you, but it will be available for you as soon as we're off the phone.

MS. CHAPPLE: Your Honor, we'd be happy to pick up a copy and fax it to Shelley.

MS. SADIN: That would be great.

THE COURT: Thank you.

I looked at a transcript of our discussion on the 15th and I note that when I referred to the motion for class certification, I said that I intended to grant it. And to clarify any ambiguity in that regard, I will say for the record now that the motion has been granted.

As I told you in court, I'm persuaded that the plaintiff has satisfied all the requirements for a class treatment. you will be receiving a short statement from me in the nature of a brief memorandum opinion on the class certification issue, but I think the basis for granting the motion is apparent to us all.

With regard to the proposed order, I have a question that I would like you to address. The proposed order talks about disclosing the registry or information. And I think I have a clear idea of what we are trying to do with this order and I'm not sure that the language that you [5] propose is ideal.

MS. SADIN: That wouldn't surprise me.

THE COURT: We plainly do not want the registry, as such, being made available to the public, whether electronically, via the internet, or in book form at the police stations. The registry, as such, may not be publicly disclosed or disseminated.

With regard to the registry information, that is to say information contained in the registry bearing on any particular registrant, it's my understanding that the information may be disclosed provided the registrant is not identified as being in the registry.

MS. SADIN: Correct.

THE COURT: Okay. Then with that clarification, I think I can modify the language and hopefully make it a little bit simpler and cleaner for people.

What I propose to say is as follows: "Defendants are permanently enjoined from disclosing or disseminating to the public, either in printed or electronic form, the registry or registry information concerning a member of the due process class if the registry or registry information contains the name or other identifying information of the class member and identifying any member of the due process class as being included in the registry."

I realize it may be somewhat difficult for you to [6] absorb that and reflect on its adequacy, but the intent is that the registry, as such, could not be publicly disclosed or disseminated and registry information could not be publicly disclosed or disseminated if it contained the name or other identifying information of the class member. Do you have any problem with that?

MS. SADIN: No. From the plaintiff's side, Your Honor, that sounds okay.

MS. CHAPPLE: I guess our concern, Your Honor, is that the order doesn't enjoin the Department of Public Safety from disclosing information in the Bureau of Identification of criminal history information that is available from sources other than the registry. And I think that was the agreement that both sides had. That that information, criminal history information, would still be available as long as it's not identified as being from the registry.

THE COURT: The order goes on. It says, "Provided nothing in this order will impair access to the

registry by law enforcement agencies and officers," and they're specified, "to preclude law enforcement agencies and officers carrying out official duties from using information contained in the registry in specific criminal investigations and prosecutions so long as members of the due process class are not described to the public as being [7] included in the registry."

Three: "Preclude law enforcement agencies and officers carrying out official duties from disclosing or disseminating to the public information necessary to protect the public concerning a specific person so long as members of the due process class are not described to the public as being included in the registry."

Or, four – and this is the point you mentioned. "Affect the public's ability to obtain individual criminal conviction history records pursuant to the applicable statutes."

The order would go on to require that defendants serve a copy of it on each local police department, law enforcement agency or other state or local entity to which it has transmitted registry information. And the order notes that each such department agency or entity is bound.

The order continues. "Pursuant to this order but without limitation of it, defendant shall immediately take down the registry website and cease making publicly available the registry or registry information maintained pursuant to the statute at local police departments and state police troops."

All right?

MS. CHAPPLE: Your Honor, just for the record, I guess I'll state the obvious, which is we don't represent

[8] the municipal police departments. We can't – I mean, we certainly will comply with Your Honor's order, but we can't make any representations as what their reaction will be to the order; whether they feel that the Court has jurisdiction to order them not to disclose this information. But we certainly will comply with the order, make them aware of the order.

THE COURT: Well, if you think that there might be some potential difficulty in that regard, it might be in their interest if somebody were to tell them that if they have notice of this order and they violate it, they might have a contempt problem on their hands and they probably shouldn't risk that without at least checking with counsel beforehand.

MS. CHAPPLE: Hopefully they would do that, Your Honor.

THE COURT: I would hope so.

I know that the defendants moved for a stay in papers that they submitted to us. And I'm not going to stay the order to give the defendants an opportunity to seek a stay from the Court of Appeals. Ordinarily, I would do that in most cases if only to avoid imposing on counsel and the judges of the Court of Appeals unnecessarily.

However, in this situation, I think that I am faced with an extraordinary circumstance permitting no stay.

[9] What am I referring to? The correspondence that I received late yesterday tells me that a local television station has made a Freedom of Information Act request seeking a copy of the registry. I think that were I to grant a stay of my order to permit the defendants to seek a stay from the Court of Appeals, the freedom of information act

request would complicate this situation very much for all concerned. And I think it's better to try to maintain the status quo, so-to-speak.

It's my understanding that the website can be taken down with a key stroke or two. And if the Court of Appeals should decide to stay my order or reverse it, the website can be reinstated with a key stroke or two.

MS. QUERIJERO: Your Honor, Carolyn Querijero, Deputy Attorney General. Can I just speak for a moment to the stay order?

The Attorney General isn't available at this moment, as I think you've been informed. He will be in about 15 minutes.

But we would really ask that you reconsider that and just enter a stay until Monday or make this order effective Monday. Your concerns about the Freedom of Information request, I think I can provide some assurance to you, under the Connecticut law, we have up to four business days to respond to the request. And we could certainly [10] represent to you and assure you that we would not respond to it before Tuesday morning. So if we could have a stay until Monday or have the order take effect on Monday to enable us to get our State papers ready and file them with the Second Circuit, we would – you know, we would ask for that.

THE COURT: All right. I have given careful consideration to this matter. And I don't think a stay is warranted. The defendants have made statements to me and to the public that the decision is plainly wrong and exceedingly dangerous. I think those statements are hyberbole at best. I have thought carefully about the

potential consequences of this order. And I see no danger to the public whatsoever.

If, as the Attorney General has been telling people, the order might imperil school children because a sex offender might move in next door without notice, then I would urge the Attorney General to tell the people involved in law enforcement to be more alert. They are free to continue to check the registry on a daily, indeed hourly, basis. And if they see that somebody has moved in across the street from a school, nothing in the order prevents them from warning everyone in that school. Nothing prevents them from going to that offender and making plain the law enforcement interest and seeing to it that those children are protected.

[11] What the order prevents is public disclosure of that individual's inclusion in the registry and his registry information identified as such.

Consequently, I think you'll see that I give little or no weight to the in terrorem arguments that have been made to me and broadcast widely to the public.

In fact, as a result of all that, your arguments lack credibility with me. And for that reason, too, I deny the request.

Is there anything further?

MS. QUERIJERO: No. Just to note our objection for the record, Your Honor.

MS. CHAPPLE: Your Honor, two brief matters.

One is that I'm not so sure that the website can be taken down as easily as Your Honor has suggested. The

State Police in anticipation of the order has begun preparing. We will notify the Court soon when they expect to be able to have it down, especially if they anticipate any delay. But we've been led to believe that it's not as simple as Your Honor has suggested.

THE COURT: Well, I don't claim to be an expert, but I have advisors who seem to be knowledgeable in the area and they tell me that it can be done quickly and inexpensively. If you have any problems, I would appreciate learning about it and I would urge you to please [12] err on the side of informing me because I am concerned that the order be complied with, all right?

MS. CHAPPLE: Yes, Your Honor.

I was wondering if you could tell us the date when the motion for class certification was granted. If it was the 15th or some time after that.

THE COURT: We can treat it granted as of today on the record in this conference.

MS. CHAPPLE: Thank you, Your Honor.

THE COURT: Anything further?

MS. SADIN: No, sir. Just if the defendant would also keep the plaintiff's apprised of any difficulties with the website. My concern is that everybody's out there trying to – sort of like the Napster case – download it right away.

THE COURT: All right.

MS. SADIN: In anticipation of an order. So the quicker it comes down, I think that's a very important point.

MS. CHAPPLE: We will represent to the Court that we'll advise the Department of Public Safety to make every effort to get it down immediately, as soon as it's possible.

THE COURT: All right. Thank you all.

MS. SADIN: Thank you, sir.

[13] CERTIFICATE

I, Darlene A. Warner, RDR-CRR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

DARLENE A. WARNER, RDR-CRR
Official Court Reporter
450 Main Street, Room #223
Hartford, Connecticut 06103
(860) 547-0580

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, Plaintiff	:	
V.	:	CASE NO. 3:99CV314(RNC)
DR. HENRY C. LEE, ET AL., Defendants.	:	

MEMORANDUM OPINION ON DEFENDANTS' MOTION FOR STAY OF PERMANENT INJUNCTION

In a telephone conference earlier today, the Court granted plaintiff's motion for a permanent injunction on behalf of the due process class, entered the injunction, and denied defendants' motion for a stay of the injunction, stating that this memorandum opinion addressing the denial of the stay would follow.

Defendants have moved pursuant to Rule 62(c) for a stay of permanent injunction pending appeal or, in the alternative, for a more limited stay to permit them time to seek a stay from the Court of Appeals. The merits of the stay have been briefed and were argued on May 15. After careful consideration, I have concluded that the motion for stay pending appeal must be denied and that, in the extraordinary circumstances presented in this case, even the more limited stay should not be granted.

In evaluating a Rule 62(c) motion for stay of an injunction, the Court must consider (1) whether the applicant has made a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the

applicant will be irreparably injured unless a stay is granted; (3) whether a stay will substantially injure other parties interested in the proceedings; and (4) the public interest. *See Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Defendants have not made a strong showing that they are likely to prevail on appeal. They have presented no new evidence or authority since the due process claim was briefed and decided. The fact that the Second Circuit has not previously considered the due process issue presented here is relevant but by itself plainly insufficient to justify a stay. Of the cases cited by the defendants, only two involve an undifferentiated registry. *See Akella v. Michigan Dep't of State Police*, 67 F. Supp. 2d 716 (E.D. Mich. 1999); *Lanni v. Engler*, 994 F. Supp. 849 (E.D. Mich. 1998). Neither case establishes that the defendants are likely to succeed on appeal.

The defendants have been urged to identify any harms that could arise from entry of the injunction barring them from continuing to make the undifferentiated Registry publicly available while the case is on appeal. At oral argument on May 15, their counsel was unable to identify any harm that is not more than adequately addressed by the careful tailoring of the injunction. *See May 15th Hearing on Motions*, Tr. at 10-23. In the telephone conference this morning, the defendants were given another opportunity to comment but declined to do so.

One example of asserted harm that the State has singled out for special emphasis both in court and in the media hypothesizes a situation in which a dangerous sex offender relocates his residence to a dwelling across the

street from a school for young children. If that were to happen in the real world, reasonably diligent law enforcement officials in that city or town could readily discover the offender's change of residence simply by checking the Registry, which will continue to be updated and remain available to law enforcement officials and agencies at all times. Moreover, if that situation were to occur, nothing in the injunction would prevent law enforcement officials from taking steps to inform everyone at the school and everyone in the neighborhood of the registrant's prior offenses. The injunction would prevent law enforcement officials from providing the Registry itself to the public, identifying the registrant as being included in the Registry information in a manner that revealed his inclusion in the Registry. The defendants have not shown that those limitations would cause anyone harm.

The only other harm defendants have mentioned is an asserted risk that the injunction could cause the State to lose federal funds because of the restrictions imposed by the Wetterling Act. Assuming that the loss of federal grant money that would follow from a state's noncompliance with the Wetterling Act could constitute irreparable harm, the State need have no such concern in this case because the injunction permits it to make the disclosure required by federal law, that is, disclosure of information necessary to protect the public from a specific person. *See* 42 U.S.C. § 14071(e)2). The injunction only requires that, in releasing such information, law enforcement not identify the specific person as being included in the Registry. This limitation in no way dilutes or diminishes the effectiveness of the warning because inclusion in the Registry reflects no assessment of a person's dangerousness and

hence the fact of inclusion adds nothing to the information law enforcement can otherwise provide.

This is not a situation in which denial of the stay will eliminate any meaningful opportunity for the defendants to seek review in the Court of Appeals. *See, e.g., Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (injunction ordering FBI to turn over confidential documents to newspaper should be stayed pending appeal; disclosure of documents will utterly destroy the status quo and moot FBI's right of appeal). However, granting the stay would permit the defendants to violate the due process rights of all current and future registrants on an ongoing basis until the appeal was resolved, which necessarily would cause substantial, irreparable harm to them. *See Jolly v. Coughlin*, 76 F.3d 468, 468, 482 (2d Cir. 1996) (a "presumption of irreparable injury . . . flows from a violation of constitutional rights"), *overruled on other grounds* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

With regard to the public interest, the interests in public safety and effective law enforcement have already been addressed above. As explained there, the injunction does not threaten any harm to those interests. In addition to those interests, the Court must also be concerned about the public interest in not having the State engage in conduct that results in an ongoing violation of federal constitutional rights and, as plaintiff's counsel have correctly pointed out, there is a distinct public interest in having this Court discharge its duty to protect and enforce those rights. The State has unambiguously taken the position that in the absence of class certification it would refuse to extend the benefit of this Court's ruling to anyone except the named plaintiff. *See May 15th Hearing on Motions*, Tr. at 24. Though hardly dispositive of the issues

presented by the State's request for a stay, the State's deliberate refusal to give similarly situated registrants the benefit of the Court's ruling on the due process issue in the absence of an order providing classwide relief cannot be overlooked.

Turning to the defendants' request for a brief stay while they try to obtain a stay from the Court of Appeals, ordinarily such a request would be granted if only to avoid causing undue hardship to counsel and the Court of Appeals. However, extraordinary circumstances presented here make it necessary to deny even such a brief stay. Anticipating today's order granting plaintiff's request for a permanent injunction barring public disclosure of the Registry, a local television station filed yesterday a Freedom of Information Act request for a copy of the Registry database, presumably because the station would like to provide public access to the Registry through its own website. The defendants have informed the Court that an action on the FOIA request is not required until Tuesday, and that they would endeavor to complete and file their stay application in the Court of Appeals by Monday. This gives no assurance that the Registry would not be released to the station on Tuesday. Moreover, the station's request highlights the risk that persons unaffiliated with the defendants have been, are, or would be taking steps to download the information in the Registry. Plaintiff's counsel's reference this morning to the recent Napster controversy is a helpful reminder of the ease with which information provided over the Internet can be copied and disseminated. The Court is also aware that before New York State put any part of its sex offender registry on the Internet, a private group copied the subdirectory of high risk offenders and created its own website. *See*

http://www.parentsformeganslaw.com/html/offender.lasso. It therefore appears that leaving the defendants' website up and running even for only a few more days would needlessly risk enabling third parties to download and print the contents of the database. If such a project were accomplished, the Registry would continue to be publicly available. Dissemination of such a copied registry by private parties would not be reachable under the Fourteenth Amendment, but it would have been made possible only because of the State's prior violation of registrant's due process rights.

In sum, the balance of equities on the request for a stay tips decidedly in favor of denying the stay and the defendants' request for a stay is therefore denied.

It is so ordered this 18th day of May, 2001.

/s/ _____
Robert N. Chatigny
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE, Plaintiff	:	
V.	:	CASE NO. 3:99CV314(RNC)
DR. HENRY C. LEE, ET AL., Defendants.	:	

JUDGMENT

This action having come before the Court on cross-motions for summary judgment, and

The Court having considered the motions and the full record of the case including applicable principles of law, and having filed its Ruling and Order on Cross-Motions for Summary Judgment granting plaintiff's motion as to the due process claim, denying plaintiff's motion as to the ex post facto claim, denying defendants' motion as to the due process claim, and granting defendants' motion as to the ex post facto claim, and

The Court having subsequently considered and granted the plaintiff's motion for certification of a class of all persons who are subject to the registration and public disclosure requirements of the Connecticut sex offender registry act, Connecticut General Statutes §§ 54-250 *et seq.*, without notice and an opportunity to be heard on the question whether they are dangerous, and

The Court having also considered and granted the plaintiff's motions for declaratory and permanent injunctive relief in favor of the due process class, and the Court

having entered, by separate order dated today, a permanent injunction against public dissemination and disclosure of the Connecticut sex offender registry, it is hereby

DECLARED that any public disclosure or dissemination of the Connecticut sex offender registry containing the name and identifying information of a member of the due process class, or public disclosure or dissemination of the fact that any such registrant is included in the registry, violates the registrant's Fourteenth Amendment right not to be deprived of a liberty interest without due process of law, and

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the plaintiff on the due process claim and in favor of the defendants on the ex post facto claim.

Dated at Hartford, Connecticut, this 18th day of May, 2001.

KEVIN F. ROWE, Clerk

By: /s/ _____
Linda J. Kunofsky
Deputy Clerk

EOD 5-21-01

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOHN DOE,
Petitioner-Appellant
-vs-
DR. HENRY LEE,
Respondent-Appellee

DOCKET NO.: 01-7561
June 5, 2001

TRANSCRIPT OF CIVIL CAUSE FOR MOTION

BEFORE: JOSÉ A. CABRANES,
Circuit Judge
CHESTER J. STRAUB,
Circuit Judge
ROBERT D. SACK,
Circuit Judge

APPEARANCES:

For the Appellant: RICHARD BLUMENTHAL, ESQ.
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Proceedings Recorded by Electronic Sound Recording
Transcript Produced by Transcription Service

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[2] THE COURT: All right, let's come forward with Doe against Lee.

MR. BLUMENTHAL: Thank you, Your Honor.

THE COURT: Go ahead, Mr. Blumenthal.

MR. BLUMENTHAL: For the record, Your Honor, it's Richard Blumenthal, Attorney General for the State of Connecticut, on behalf of the State of Connecticut. We bring to this court a motion for a stay of the order that Judge Chatigny entered which bars the State of Connecticut from disclosing or making available publicly very critical registry information relating to sex offenders, our law known commonly as our Megan's Law.

The judge below struck down our law and issued an order which he refused to stay and refused also to give us a hearing at which we would have presented, and we proffered to the court evidence showing, the very dramatic and drastic harm, ongoing harm, to the State of Connecticut resulting from this order, harm that is typified by some of what we proffered to the court below that, for example, three hundred and thirty seven of the two thousand seventy five people on that registry have been rearrested for another offense.

The Court is well aware, from its own opinions, for example, in Doe versus Pataki, about the very high recidivism rate that characterizes this group of offenders and poses an ongoing danger to the state's citizens.

[3] This kind of information on the registry made available through the internet, through local police departments, and through the state police is the source of very widespread interest and information to our citizens.

THE COURT: Is the information at the outset public information that's simply gathered this way? If I had enough time and enough gasoline, could I get it myself?

MR. BLUMENTHAL: If Your Honor had enough time and gasoline you could conceivably go to either the state police, where it's maintained centrally – all of it public information, so-called conviction information, regarding the name, –

THE COURT: Could I go from court to court and find it that way?

MR. BLUMENTHAL: You could do it that way, but the state continues to maintain its registry and continues to make the information –

THE COURT: No, I'm more interested in the question as to whether before it gets to the registry it's public information.

MR. BLUMENTHAL: It is all public information, Your Honor. That's right, Judge Sack. It is all public information –

THE COURT: I was going to say, just in passing, that maybe my past is haunting me, but there's an element of prior [4] restraint in all of this. I mean, it's a federal judge telling somebody else – in this case a state or state officers – enjoining them from publishing arguably true information which sort of sounds like a typical prior restraint to me, unless prior restraint – unless you have no First Amendment rights, or prior restraints don't count here, or perhaps it's a perfectly legal prior restraint. But I saw no First Amendment arguments in the papers.

MR. BLUMENTHAL: There aren't any First Amendment arguments in the case because statutorily, Connecticut – our state police and our department of public safety are required to disseminate and disclose this information by law, which the judge struck down. And in fact, all of this information would be available under the Freedom of Information Act, which the judge also enjoined.

THE COURT: But an injunction against the uttering of truthful information ordinarily is suspect under the – highly suspect under the First Amendment, and whether you have to or you don't have to, I would be interested in that dimension of the question of the legality of the order. After all, it's an injunction. It could have been an injunction enjoining you do many things, but what this injunction does is it enjoins you from publishing information.

In fact, I understand the whole reason that the district court refused a temporary stay was because the public [5] was interested and was there and ready to receive and disseminate this information.

MR. BLUMENTHAL: That is absolutely correct, Your Honor. The fact that prompted the order was an inquiry on the part of one of the television stations for the registry, and all of it is indeed truthful information that an individual's name is on the registry. But it also goes beyond simply publishing or uttering or articulating that fact. It is, in fact, denying public access to information that is there.

In other words, the fact that leads anyone in the public to think any of these individuals is dangerous is the fact of that person's having committed and having been

convicted of a sex offense. And that information is absolutely correct. And the public is denied access and availability to that information as a result of the court's order, without –

THE COURT: Well, the public is denied access by the registry, but it is not denied access to the information via other sources.

MR. BLUMENTHAL: That is correct, Judge Straub. Conceivably, if one knew enough to access the information without the registry, one could do so, but certain inquiries simply cannot be responded to if one does not know, for example, the address, or date of birth, or gets wrong by one figure the date of birth, inquiring through that means of the state police.

[6] And this order has created vast uncertainty and anxiety – for example, local police, as this Court might well understand, are completely in a quandary as to what they say when a person is on the registry. Can they disclose that fact? No, they can't.

THE COURT: Well, can you tell us something about the purpose of the registry? Why is the registry – what is the purpose of having this registry?

MR. BLUMENTHAL: The purpose of the registry is to make this information as accessible and available to the public as possible. It is on the internet with a specific disclaimer, as the Court is well aware, that each of these names is there without any risk assessment, any finding of dangerousness, any determination that that person is perilous.

THE COURT: Does Judge Chatigny's order reach that species of dissemination; that is, does it prohibit its placement on the internet?

MR. BLUMENTHAL: It does indeed, Your Honor. It shuts down the internet. The internet has been shut down since this order. We sought a stay from the court, and without any hearing the court denied that stay; in fact, refused to hear any evidence on the harm that would be done to the state.

THE COURT: So the court has basically shut down the registry itself. The registry itself cannot be used for whatever purposes it was meant to serve.

[7] MR. BLUMENTHAL: The registry can be used for limited law enforcement purposes. For example, the list, which is the registry, can be provided to other law enforcement agencies. It can be used for the national database. It can be used by police to proactively warn. But I want to emphasize that there is not a scintilla – not one piece – of evidence of any harm to any specific individual whose name is on that registry, although this case has been pending, was pending for more than a year on cross motions for summary judgment before the court ruled.

It was then another six weeks before the court issued the order and denied us even a temporary stay to come to this Court as we have now done, and we feel that there is, under the standard applicable in this Court, a very substantial question on the merits, and a balance of equities that favors the state. Thank you very much.

THE COURT: Ms. Sadin?

MS. SADIN: May it please the Court, I'm Shelley Sadin, and with me is CCLU legal director Phil

Tegeler, at counsel table, representing the plaintiffs. Your Honors, Mr. Blumenthal is right that you must weigh the relative harms. To see that there is no irreparable harm to the state in having this injunction in place pending on appeal, Your Honors need look no further than the language of the injunction itself. It's attached as Exhibit 1 to our opposition to the memorandum, [8] and it's very carefully tailored to address what the court found was a constitutional violation of the due process class's rights.

Courts have recognized that that kind of ongoing constitutional harm constitutes irreparable harm. Even an allegation of a constitutional violation has been seen as irreparable harm. These state – and again, if you look at the injunction, which was very carefully tailored to address the due process violation that the court found, the injunction does – and I'm sort of paraphrasing, but I'm trying to quote pretty closely the language of the order.

The injunction does nothing to impair access to the registry by law enforcement agencies and officers. It does – so that any law enforcement officer can have access to it.

THE COURT: How about a member of the public?

MS. SADIN: I'm Sorry?

THE COURT: How about a member of the public?

MS. SADIN: A member of the public would not any longer be able to go – however, Your Honor, a member of the public still can contact the court records department and give a name and – you know, give some description and find out whether or not –

THE COURT: Highly impractical, don't you think?

MS. SADIN: I'm sorry?

THE COURT: Highly impractical, what you suggest, [9] don't you think?

MS. SADIN: In fact, with all due respect, Your Honor, it is not impractical, and people do it all the time. If there is someone who moves into their neighborhood about whom they have some concern, you can call and find out whether or not – if someone applies for a job –

THE COURT: Why isn't that just as injurious to John Doe as having it on the registry? I mean, why shouldn't you just shut that down too for the same reason?

MS. SADIN: Because, Your Honor, the fact that a person has his name placed on the registry necessarily implies that the person presents a present danger. It does more than send a message that this person simply is someone who has been convicted.

THE COURT: so this is all about the false – what you allege to be the false implication that name on registry equals danger.

MS. SADIN: Yes, sir, and in fact the stated – Judge Cabranes asked – the stated purpose of the registry is to protect the public. When you think about it, the only reason that a member of the public would need to know whether or not a person is on the sex offender registry in order to protect themselves necessarily implies that that person presents a present danger.

THE COURT: Even though, I gather, that there is a [10] legend that specifically disclaims any dangerousness.

MS. SADIN: Well, what the legend does, Your Honor, is say that no assessment has been made by the state of whether or not a person is dangerous. It doesn't say that none of the people on the list are dangerous. It does not say that there are varying degrees of dangerousness of people who are on the list.

THE COURT: Perhaps the legend should be improved.

MS. SADIN: I think, Your Honor, the problem is that the necessary implication comes from the purpose of the law. The Attorney General has emphasized the purpose of the law is to protect the public. If there are people who are on the list, it necessarily means, to the public, that they are dangerous. Those are people from whom members of the public need to protect themselves. The problem that Judge Chatigny found is that is not true with respect to all of the registrants on the list.

THE COURT: Can the head of a local school board go to the local police authorities and ask for a disclosure of all the individuals in the registry in that school district?

MS. SADIN: What he would –

THE COURT: Or must they ask for particular names?

MS. SADIN: What he would be able to do still, under this order, Your Honor – if a – it works two ways. If the head of a school had a suspicion, or wanted to know,

you know, [11] who lived in the neighborhood, whether or not people living in the neighborhood of the school had sex offender convictions, that person still could go to the same repository – the public records of convictions are – were available before the registry. They remain available under this injunction. Moreover, Your Honor –

THE COURT: And could get all the names in that particular area, is that correct?

MS. SADIN: Yes. yes, indeed. You could get – well, what you could do is – you'd need to know – I suppose you could just – there are ways of finding who lives in the neighborhood, and then you could go and get those people's names.

THE COURT: Well, then what is the difference between approaching it that way and getting it off the internet directory?

MS. SADIN: The difference, Your Honor, is that the internet directory doesn't just include people who present a present danger. It includes everybody who's been convicted of any sex related offense. In fact, Your Honor –

THE COURT: Yes, but I thought I heard you say that the individual in our hypothetical could get the names of all those on the directory in the affected community from the local police authorities.

MS. SADIN: The head of the school would not be able [12] to go – the head of the school would have to be able to give names to the police. The head of the school would have to be able to say look it, I know that these people live in this neighborhood, and I wish to know whether or not any of them has a record.

Mind you, Your Honor, if any of the people in that neighborhood presented a present danger, under this injunction there is no restriction on law enforcement's advising the head of the school that such people –

THE COURT: But you must identify individuals.

MS. SADIN: I'm sorry?

THE COURT: You must identify them by name.

MS. SADIN: If the head of the school –

THE COURT: Yes.

MS. SADIN: – wished to find out whether they had conviction records, that is true.

THE COURT: Suppose the head of the local school board took with herself the list of all the registered voters, all those – in all possible registries and asked the local police authorities to compare that against the registry which is no longer available on the internet. Under the injunction, could the police provide that information?

MS. SADIN: The police are unrestricted in their ability to use the registry for law enforcement purposes.

THE COURT: So that the information could be made [13] available irrespective of the injunction against the internet directory by the head of a local school board who has sufficient imagination in providing the data to the local police.

MS. SADIN: The language – yes, sir. The language –

THE COURT: All right. That being the case, what is the difference? Why not have it available on the internet directory?

MS. SADIN: Because, Your Honor, the message that is sent is that everybody on the directory presents a present danger. That is really the message that the public is getting. The public needs to know where these people are, what they look like, and where they live because they present a present danger.

THE COURT: But in my hypothetical the police are disclosing the information against the list presented by the head of the local school board because of the same inferential concerns.

MS. SADIN: Well, Your Honor –

THE COURT: And therefore, there is a prior restraint in respect of the internet director.

MS. SADIN: The difference, Your Honor, is this: law enforcement is allowed to provide people with whatever information is necessary to protect them and protect the [14] public. If, in Your Honor's hypothetical, the headmaster were to ask about every person who lived in the neighborhood who was on the registry, and if there were people who presented absolutely no public safety risk and with respect to whom the police had no reason to believe that they presented a present danger, those people would be protected from disclosure that they had a sex offender history.

However, Your Honor, if, on the other hand, the public – the headmaster had those people's names, he could still find out whether or not they have a history. There is no restriction on the ability of an individual to go to the court

records department and find out whether or not any given person has sex offender history, so that the headmaster could still get that –

THE COURT: So simply put, you can get the information, you just can't get it on the internet.

MS. SADIN: And you also cannot get it at – the registry itself is no longer available in hard copy form at police departments. The very important thing I Your Honors misunderstand –

THE COURT: Ms. Sadin, hold on one second.

MS. SADIN: Yes, Sir.

THE COURT: And don't worry about the light. We can turn the light off, and I'll give Mr. Blumenthal some time as well.

[15] MS. SADIN: Okay.

THE COURT: But what if the State of Connecticut decided to put online this other system, the whatever-it-is record of convictions, the larger database available to the police departments of Connecticut?

MS. SADIN: Meaning every person's conviction history?

THE COURT: Yes, which is available to the police right?

MS. SADIN: Yes, sir, and to members of the public.

THE COURT: They can punch in a name, right?

MS. SADIN: And to members of the public as well.

THE COURT: Well, exactly. All right., What if they just put – if it's available to the public, what do you think is the difference – presumably, that larger list available to the general public includes these offenders, does it not?

MS. SADIN: It includes these offenders. It includes people who have been convicted of petty theft, of the smallest crimes.

THE COURT: No, I understand. So it includes everything, including these offenders, so it's already available to the general public, either in printed or some electronic form, right?

MS. SADIN: Um hmm. yes, sir.

THE COURT: Is it available on the internet?

[16] MS. SADIN: It is not.

THE COURT: It is not.

MS. SADIN: No.

THE COURT: Well, what if it were? Would you object to that?

MS. SADIN: It would be a different list, Your Honor. I think the implication is that the people who have been gathered together in this list present a danger to families and children.

THE COURT: So this is a special – there's something important, in your view, in the fact that it's this

particular – these particular offenses which are grouped together on a particular registry.

MS. SADIN: Yes, sir, and in fact that was the problem that Judge Chatigny found with respect to the list. The stated purpose is to protect members of the public from present danger. I think if you had a compilation of everybody who had committed every crime in Connecticut, there would not be an implication that all of those people present a present public danger. This list is different. This list implies that everybody on the list is dangerous.

And the state, Your Honor, by making representations as it does in the context of this emergency motion that there is a public necessity that people be notified what these people look like, and where they live, and who they are – that [17] necessarily implies that those people are people from whom the public needs to be protected. That may very well be true of some of the people on the list. It is not true of all the people on the list. And there is no opportunity for anyone who is on this list to context whether or not they pose a present danger that distinguishes –

THE COURT: Nor can they contest against my hypothetical school board head who comes to the local police authorities and says we are concerned about which, if any, sex offenders are residing in our school district, –

MS. SADIN: Yes, sir.

THE COURT: – and we are now giving you, because of the inference that we draw from this concern, and from the data that's available to you – we want you to check the registry against all of these local registries that

we have for other accumulated purposes. I fail to see the difference between that and the internet directory.

MS. SADIN: There is a difference, Your Honor, and the difference is that grouping these people – All of these people together necessarily implies – and putting them on the web site so that people know what they look like, and where they are, and have access to that information – that implies people need to know that information because they are –

THE COURT: But my school –

MS. SADIN: – presently dangerous.

[18] THE COURT: – board head has equivalently grouped those people and asked the local police authorities to set an officer aside to review the list of sex offenders. All the inferences are identical. All the data is identical. All the concerns you raise are identical, except that it must be done inside a building rather than available on the internet.

MS. SADIN: There is a distinction, Your Honor. I'm sorry I haven't made it clear. Judge Chatigny's order precludes law enforcement officers from identifying the information as having come from that compiled list, so that if anybody presents a danger, if anyone has a conviction history which is of concern and should be communicated in order to protect the headmaster and the people in his school, the law enforcement officer can communicate that person's history, can communicate whatever information is necessary to protect the school but would not be allowed to tell the headmaster that the information that he has just – that the officer has just provided has come from – he has that information because it's on a –

THE COURT: Not so.

MS. SADIN: – sex offender registry.

THE COURT: Not so, because I have come to the local police authorities with a list of names, and I have told those authorities why I am concerned. And I have asked those authorities to check the registry. And they come up with [19] names, and they don't tell me where they got them, but we all know where they got them.

MS. SADIN: Once again, Your Honor, there is an important distinction because the order does limit people – does preclude people from being identified, from being branded, as being on the registry. And Your Honors, if there were –

THE COURT: A distinction with no difference whatsoever.

MS. SADIN: I think, Your Honor, there is a distinction. If people are not identified as being on the sex offender registry, that does make a difference. And Your Honors, there is no reason why Connecticut's system cannot be the same as in other states where – for example, in New York, where there are opt-out provisions. There are provisions where every person who is registered on the sex offender registry in New York – there is notice and an opportunity to be heard on whether or not that person is dangerous.

That means that there are – that the list in New York consists of people who belong on the list, and the problem in Connecticut is that we have a –

THE COURT: Why do they belong? There's been no judicial determination, is there? Or is there a judicial

determination in New York that the person is not dangerous?

MS. SADIN: Well, there is an opportunity – yes, there is an opportunity to be heard.

[20] THE COURT: Who makes the decision?

MS. SADIN: I can't remember whether it's a – it is within the context of a court system, though, sir. And in fact, in Connecticut, with respect to some limited number of crimes, there is an opportunity for notice and a chance to be heard on whether or not you're dangerous, but not with respect to all crimes.

THE COURT: Well, you know, dangerousness is something that psychiatrists and judges are loathe to define in particular cases, and I'm – well, let me go back to my hypothetical. Assume for the argument that the state decides to put online, as it were, the registry of all felonies. Include misdemeanors, for that matter, but they do it by category, so they have burglaries, murders, et cetera, so they expand the registry now. Do you have any objection to that? How is that different from what is now available but perhaps not by category? Maybe it is by category.

MS. SADIN: It's less bad, but I think it's still bad. I mean, happily I'm not – we're not facing that in Connecticut. I think it's still – just the fact that you need to communicate where people are, and what they look like, and – I think it implies that there is – these people present a present danger. What about people, Your Honor, who have been convicted of larceny offenses, and they have paid full restitution, and they have done community service, and they've [21] been fully rehabilitated, and they present absolutely no danger to anybody? What is the

purpose of broadcasting to the world where those people live, and what they look like, and what they're up to?

THE COURT: That's a different question. I'm sorry, am I right – what you're saying is that there's – because of what this particular list is, not just names, but because of what this particular list is –

MS. SADIN: Yes, sir.

THE COURT: there's stigma plus the need to register, so you have stigma plus, and what you're suggesting, I think, is the equivalent of a name-clearing hearing, that they ought to have the ability with notice to have a hearing that proves that the implication that they're dangerous is not true.

MS. SADIN: That's precisely right.

THE COURT: And that – now, therefore let's assume you put that – were to, for some reason or other, put that in place and have a two level registry, one that says here are all the names, and here are the list of people who have established that they – they've had name-clearing hearings, and they've established that they're not – appear not to be dangerous, assuming there are human beings who can made decisions like that. I mean, would that be constitutional/

MS. SADIN: I think it would be – it would not [22] present the same problems. I hate to get into it, because I just – there are all kinds of issues presented, Your Honor, by these lists. It's, you know, on whom should the burden fall is, you know, proving dangerousness or non-dangerousness. It's quite complex.

But other states, Your Honors, have been able to resolve this issue. Massachusetts has been working on it. Every state that has a Megan's Law has faced these issues, and there have been various forms of Megan's Law statutes. The problem is Connecticut has one which presently does stigmatize people without giving them notice and an opportunity to be heard. And presently, this order precludes the dissemination of that list without getting in the way of law enforcement, without posing any threat to the public.

THE COURT: Thank you. I'll give Mr. Blumenthal a couple of minutes to respond.

MR. BLUMENTHAL: Thank you, Judge Cabranes. I won't ask for equal time, but I would respectfully ask for just a couple of minutes to clarify some points. Connecticut could have adopted systems in Massachusetts, or New York, or a variety of other states, but it has chosen this system, which is the one that exists in nineteen states around the country, which does not involve a system of classification or differentiation. And it has been upheld by two Courts of Appeals, by two district courts. We cite the decisions in [23] *Russell v. Gregoire* and *Dean* versus *McWherter* in our brief.

We believe that there is, under this Court's standard, a substantial question – a substantial merit on our side, and we believe that the court eventually will uphold it, and we would ask for an expedited appeal. But in the meantime, there are an average of a hundred and fifty thousand Connecticut citizens every month, since 1998 when this list went public in this way, that have sought this information.

Hypothetically there are a wide variety of ways that a school board head, a day care center executive director, a parent could access information, but he or she would need to know date of birth, social security number, a variety of other information, including, for example, address and correct name, which may not be available.

Bottom line, though, Judge Straub, you're absolutely right, the concerns, the inferences – they're all the same, whether this name is on the registry or not, whether the registry is on the internet or not, because the stigma results from the conviction. That's what leads to the perception of dangerousness. If someone has been convicted of a sex offense, that person will be regarded by some element of the public as potentially dangerous.

And the state has gone to great lengths to try to avoid any implication in making this information available that it is trying to reach that enormously difficult issue of [24] whether an individual is dangerous.

And Judge Cabranes, you are absolutely right, this question has bedeviled psychiatrists, lawyers, judges. And the state, in publicizing and making available and accessible this information, is not trying to draw that conclusion. We would simply submit that the balance of equities weighs in favor of avoiding the potential harm to the state that results from this ongoing order, and that the stigma, while it may exist, is purely hypothetical.

There has been absolutely no evidence, no proffer of evidence, that anyone's been denied a job, has been refused a place to live because of the use of this registry.

THE COURT: Would it be useful, in your view, to have that question in due course remanded to the

district court to have an evidentiary hearing on the question of stigma, or on the issues that you claim there is no evidence in the record to support the injunction?

MR. BLUMENTHAL: Well, we have obviously made that an issue, the fact that there has been no hearing. The judge reached his conclusion in ruling on summary judgment saying that one could reasonably conclude that there is this perception of dangerousness. One could reasonably conclude – that's a quote from the opinion – without one piece of evidence on public perception; likewise, reached the conclusion on this – on denying the stay of the order without any [25] evidentiary hearing, so if this case were to be reversed on appeal we would respectfully suggest that remanding it for that kind of evidentiary hearing might well be appropriate.

But in the mean time we respectfully submit, and I appreciate the Court's patience in giving me this extra time, that the appeal be expedited and that this information and the registry continue to be available to Connecticut's citizens so that public safety may be served.

The police may be able to provide this information. They may be able to notify people if they can draw some conclusion that there is an imminent threat. But that places a tremendous burden on local police to draw that conclusion, and one which we think is – they should be spared. Thank you.

(Pause in proceedings)

THE COURT: The motion for a stay is denied by a vote of two to one. Judge Straub dissents. We will expedite the appeal, and we will set down the appeal for either Thursday, July 12, or Friday, July 13. The clerk's

office will be back in touch with you, perhaps later today or tomorrow, to fix the actual date.

And the clerk's office will also establish a schedule which will make it possible to have full briefing for the merits panel for July 12 or 13. It is so ordered. Thank you.

THE COURT: With the presider's permission, may I suggest – I can't even request, but suggest that in the briefs [26] that are filed that some attention be paid to the question of whether there is a First Amendment prior restraint aspect to this? It may be there is a very simple answer to that question, but it's a lot simpler if it's briefed than if we have to figure it out for ourselves.

THE COURT: We may indeed send an order out indicating other questions, but we'll know that in short order. Thank you very much.

* * *

I, KRISTIN M. RUSIN, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Transcript is certified original only if signed in green ink.

6-11-01

/s/ [Illegible]

JOHN DOE, Individually and on behalf of others similarly situated, Plaintiff-Appellee-Cross-Appellant, SAMUEL POE,

Individually and on behalf of others similarly situated, Plaintiff-Appellee, v. DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, on behalf of Robert Bosco Director, JOHN ARMSTRONG, Comm.,

Defendants-Appellants-Cross-Appellees,

Docket Nos. 017561 (L); 01-7600 (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

271 F.3d 38; 2001 U.S. App. LEXIS 22517

July 12, 2001, Argued
October 19, 2001, Decided

SUBSEQUENT HISTORY: As Amended November 6, 2001. As Amended November 7, 2001. Writ of certiorari granted: Conn. Dep't of Public Safety v. Doe (U.S. May 20, 2002).

PRIOR HISTORY: Appeal and cross-appeal from a judgment of the United States District Court for the District of Connecticut (Robert N. Chatigny, Judge), inter alia, (i) granting summary judgment to the plaintiff on his claim under 42 U.S.C. § 1983 that Connecticut's sexual offender registration law violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and (ii) entering declaratory and permanent injunctive relief limiting public disclosure of information contained in the registry. Affirmed. Appeal and cross-appeal from a judgment of the United States District Court for the District of Connecticut (Robert N. Chatigny, Judge), inter

alia, (i) granting summary judgment to the plaintiff on his claim under 42 U.S.C. § 1983 that Connecticut's sexual offender registration law violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and (ii) entering declaratory and permanent injunctive relief limiting public disclosure of information contained in the registry. Affirmed. *Doe v. Lee*, 132 F. Supp. 2d 57, 2001 U.S. Dist. LEXIS 5668 (D. Conn.2001) Doe v. Lee, 2001 U.S. Dist. LEXIS 7281 (D. Conn. May 17, 2001)

COUNSEL: SHELLEY R. SADIN, Bridgeport, CT (Zeldes, Needle & Cooper; Philip D. Tegeler, of counsel), for Plaintiffs-Appellees-Cross-Appellant.

RICHARD BLUMENTHAL, Attorney General, State of Connecticut, Hartford, CT (Gregory T. D'Auria, Henri Alexandre, Margaret Q. Chapple, of counsel), for Defendants-Appellants-Cross-Appellees.

JUDGES: Before: CABRANES, POOLER, and SACK, Circuit Judges.

OPINION BY: SACK

OPINION:

SACK, Circuit Judge:

In this appeal, we address the constitutionality of Connecticut's version of "Megan's Law," Conn. Gen. Stat. §§ 54-250-261 (2001), amended by 2001 Conn. Legis. Serv. 01-84 (West), which requires people convicted or found not

guilty by reason of mental disease or defect[1] of designated crimes to register with the State, and mandates disclosure of the information contained in the registry to the public in printed form and through the State's Internet website. The United States District Court for the District of Connecticut (Robert N. Chatigny, Judge), in a thorough opinion, held that the law violates the plaintiff's[2] right to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution but does not constitute an ex post facto law in violation of Article I, @ 10 thereof. *Doe v. Lee*, 132 F. Supp. 2d 57 (D. Conn. 2001) ("*Doe v. Lee*"). In accordance with this ruling, the court entered declaratory and permanent injunctive relief prohibiting the State from disseminating the registry or disclosing registry information to the public except in limited circumstances. The defendants challenge the issuance of this injunction by appealing the underlying grant of summary judgment to the plaintiff on the due process claim. The plaintiff cross-appeals the court's entry of judgment in favor of the defendants on the ex post facto challenge.

We are keenly aware of the legitimate and pressing importance that the Connecticut legislature attaches to

[1] Because the terms are always used together and carry the same consequences for registrants under the Connecticut sexual offender registry law, *see*, e.g., Conn. Gen. Stat. §§ 54-251(a), 54-252(a), 54-253(a), 54-254(a), 54-255(a), 54-256, throughout this opinion we use the term "conviction" to include a finding that a person is "not guilty by reason of mental disease or defect."

[2] Although the caption lists two pseudonymous plaintiffs bringing suit on their own behalf and the "behalf of others similarly situated," for the sake of relative simplicity, we treat John Doe as the sole plaintiff and appellee; he appears to be the sole cross-appellant.

the State's ability to disseminate information about former sex offenders, principally in order to protect the health and welfare of the State's children. The particular legislative instrument it has chosen to employ, however, is too blunt properly to achieve that end. It fails to accommodate the constitutional rights of persons formerly convicted of a wide range of sexual offenses who are branded as likely to be currently dangerous offenders irrespective of whether or not they are. We therefore affirm.

BACKGROUND

I. The Connecticut Law

Like every other state,[3] Connecticut has enacted a version of "Megan's Law,"[4] which requires people convicted of certain criminal offenses, most of them sexual in nature, to register with the State upon their release into the

[3] *See Roe v. Farwell*, 999 F. Supp. 174, 177 n.1 (D. Mass. 1998); Wayne A. Logan, Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws, 89 J. Crim. Law. & Criminology 1167, 1172 (1999).

[4] The original Megan's Law was enacted in New Jersey "to identify potential recidivists and alert the public when necessary for the public safety," *Paul P. v. Farmer*, 227 F.3d 98, 99 (3d Cir. 2000) (citation and internal quotation marks omitted), and was named in memory of seven-year-old New Jersey resident Megan Kanka, who in 1994 was sexually assaulted and murdered by a neighbor twice previously convicted of sex offenses. *See id.; Doe v. Pataki*, 120 F.3d 1263, 1265 n.1 (2d Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997). As we explained in *Roe v. Office of Adult Probation*, 125 F.3d 47, 48 (2d Cir. 1997), and in *Pataki*, such laws were prompted by "the seriousness of the harm that sex offenders' actions cause to society and the perception, supported by some data, that such offenders have a greater probability of recidivism than other offenders." *Pataki*, 120 F.3d at 1266.

community and provides for disclosure of information gathered through this registry.[5] As amended most recently in 1999, Connecticut's version of the law requires registration of people who have been convicted of crimes that fall within four statutorily defined categories: criminal offenses against a victim who is a minor,[6] nonviolent sexual offenses,[7] sexually violent offenses,[8] and felonies committed for a sexual purpose.[9] *See* Conn. Gen. Stat. §§ 54-250(2), (5), (11), (12), 54-251(a), 54-252(a), 54-254(a).[10]

[5] Federal law renders states that fail to enact such laws ineligible for ten percent of a formula grant that they would otherwise receive under the Edward Byrne Memorial State and Local Law Enforcement Assistance Program, codified at 42 U.S.C. § 3756. *See* 42 U.S.C. § 14071 (g)(2)(A); Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 64 Fed. Reg. 572, 581-82 (Jan. 5, 1999). (Jacob Wetterling was an eleven-year-old St. Joseph, Minnesota, boy who was abducted by a masked man near his home in 1989 and has never been found. *See United States v. Green*, 983 F.2d 100, 100-01 (8th Cir. 1992); The Jacob Wetterling Foundation JWF Online, at http://www.jwf.org/jwf_about.html (last visited Aug. 23, 2001).) Connecticut's registration and notification system is compliant with, but not mandated by, the federal standards. See Final Guidelines, 64 Fed. Reg. at 581-82. The federal law is not challenged in this appeal.

[6] "Criminal offenses against a victim who is a minor" are defined in Conn. Gen. Stat. § 54-250(2) to include kidnapping, unlawful restraint, and a wide variety of sexual acts against persons under the age of eighteen made criminal by various other specified Connecticut statutes.

[7] "Nonviolent sexual offenses" are defined in Conn. Gen. Stat. § 54-250(5) as violations of Conn. Gen. Stat. § 53a-73a, which renders a wide variety of sexual acts Class A misdemeanors.

[8] "Sexually violent offenses" are defined in Conn. Gen. Stat. § 54-250(11) to include certain levels of sexual assault, and also kidnappings that the court finds were "committed with intent to sexually violate or abuse the victim." *Id.*

[9] The sentencing court determines whether a felony was committed for a sexual purpose. Upon such a finding, the sentencing court may

(Continued on following page)

A. Registration

Registration requirements vary depending on the type of crime for which a particular person is convicted and thereby becomes subject to the registration law. A person convicted of a criminal offense against a minor or of a nonviolent sexual offense must register with the Connecticut Department of Public Safety ("DPS") for ten years beginning within three days following his or her release into the community.[11] *See id.* § 54-251(a). In addition, a person convicted of a felony committed for a sexual purpose can also be required to register for ten years at the discretion of the sentencing court. *See id.* § 54-254(a). Finally, a person convicted of a sexually violent offense must register for the remainder of his or her life. *See id.* § 54-252(a).

Each registrant must provide the DPS with his or her name, "identifying factors" including fingerprints, a photograph, a list of other identifying characteristics, and a blood sample for DNA analysis, *see id.* § 54-250(3), criminal history record, and his or her residence address,

require the offender to register as a sexual offender. *See* Conn. Gen. Stat. § 54-254(a).

[10] The law also covers any Connecticut resident who has been convicted in another jurisdiction of a crime "the essential elements of which are substantially the same as any of the crimes" within the statutory categories. *See id.* § 54-253(a).

[11] Groups of offenders within two categories must register for life: (i) anyone who has committed a criminal offense against a minor or a nonviolent sexual offense and has a prior conviction of the same type, and (ii) anyone convicted of the crime of sexual assault in the second degree for engaging in sexual intercourse with a victim who is under thirteen years old and more than two years younger than the perpetrator. *See* Conn. Gen. Stat. § 54-251(a).

see id. §§ 54-251(a), 54-252(a), 54-254(a), which must be verified once a year, *see id.* § 54-257(c). Certain additional obligations apply to all registrants regardless of their underlying conviction. Anyone subject to the law who moves to a new residence must inform the State of his or her new address within five days. *See id.* §§ 54-251(a), 54-252(a), 54-254(a). If a registrant regularly travels into or temporarily resides in another state, he or she must register with the responsible agency there and comply with whatever additional duties that state imposes on sex offenders.[12] *See id.* Each registrant must abide by the statute's address verification requirements by completing and returning to the State within ten days of receipt a nonforwardable verification form. *See id.* § 54-257(c). Finally, anyone subject to the law must submit to having his or her photograph taken at a specified location whenever the State so requests, *see id.* §§ 54-251(a), 54-252(a), 54-254(a), at least once every five years, *see id.* § 54-257(d). Failure to comply with any of these duties constitutes a class D felony, punishable by up to five years in prison. *See id.* §§ 54-251(d), 54-252(d), 54-253(c), 54-254(b).

Disclosure and Public Notification

The statute also obligates DPS to compile the information gathered through the registration process in a central registry and to share that information with local

[12] The law also imposes a reciprocal obligation on anyone who is registered and lives in another state but regularly travels into or temporarily resides in Connecticut. *See* Conn. Gen. Stat. § 54-253(b).

police departments, state police troops, the Federal Bureau of Investigation, and coordinate agencies in other states in which registrants reside. *See id.* § 54-257(a).

The DPS must also make the registry available to the public "during normal business hours." *Id.* § 54-258(a)(1). And the DPS is required to post registry information on the Internet, *see id.* § 54-258(a)(1), something it did until the practice was enjoined by the district court in this litigation. The DPS, also pursuant to statutory prescription, "not less than once per calendar quarter . . . [is required to] issue notices to all print and electronic media in the state regarding the availability and means of accessing the registry." *Id.* Local police departments and state police troops are required to make the registry available for public inspection during office hours. *See id.* The following warning must be posted wherever the registry is open to public view: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." *Id.* § 54-258a.

The primary means of disseminating registrant information to the public was the "Sex Offender Registry" Internet database maintained by the DPS,[13] which, until it was shut down pursuant to the injunction issued by the district court, could be reached through the websites of

[13] The statute does not itself give a name to the registry. The State refers to it, and referred to it on the Internet site, as the "Sex Offender Registry," although it includes persons convicted of several crimes "against a victim who is a minor" that are not necessarily sexual in nature. *See* Conn. Gen. Stat. § 54-251(a).

several television stations, as well as through the official homepage of the State of Connecticut, http://www.state.ct.us.[14] Anyone with access to the Internet was able to search the database by zip code or town name, which produced a list of all registrants within the scope of the search, or by last name or first letter thereof. Every name that was produced through such a search yielded a direct link to another page entitled "Registered Sex Offender" containing the registrant's name, address, photograph, and physical description.

Sometime between December 1998 and May 1999, the following statement was added to the first page of the Sex Offender Registry website:

> This information is made available for the purpose of complying with Connecticut General Statutes §§ 54-250, et seq.. . . . The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual. Anyone who uses this information to injure, harass, or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.

[14] The website, which was first made available on January 1, 1999, was shut down on May 18, 2001 pursuant to the permanent injunction issued by the district court. During its first five months of operation, the website was visited more than three million times.

We are somewhat handicapped by our inability to view the website in its actual form or context because the site is no longer publicly available and neither party has supplied us with an alternative method for obtaining access to it.

For part or all of the time it was accessible, the website contained the message: "This information is made available for the purpose of protecting the public."

C. Exclusions and Restrictions

Certain people who would otherwise fall within the scope of the law are eligible for relief from these provisions. Two narrow categories of offenders need not register at all if a court so orders upon a finding that "registration is not required for public safety": anyone who was convicted of engaging, while under nineteen years of age, in sexual intercourse with a victim who was between thirteen and sixteen years old but at least two years younger than the perpetrator; and anyone who was convicted of subjecting another person to sexual contact without the victim's consent. *See* Conn. Gen. Stat. § 54-251(b), (c).

A court has discretion to order the DPS to restrict public dissemination of information about two other classes of registrants – those who were convicted either of sexual assault in a spousal or cohabiting relationship or of any crime involving a victim under the age of 18 to whom the offender is related – if the court finds that publication is not required for public safety and would reveal the

identity of the victim. *See id.* § 54-255 (a), (b). A registrant who has committed one of several specified offenses between October 1, 1988 and June 30, 1999 may petition the court for an order limiting the dissemination of his or her registration information to law enforcement purposes, provided that the court finds that such a limitation would not threaten public safety. *See id.* § 54-255(c). This right of petition is also afforded to a person who had been convicted between October 1, 1988 and September 30, 1998 of a crime within the purview of the sex offender law provided that he or she did not serve jail time for the original conviction, has not subsequently been convicted of another crime covered by the law, and has registered with the DPS. *See id.*

Apart from whatever determinations are made in the course of these proceedings, neither the DPS nor any other agency responsible for administering the registration law affords a person subject to the law an opportunity to be heard on the issue of whether he or she is dangerous or a threat to public safety before requiring that person to register and disclosing the information about him or her to the public.

II. Parties

According to the plaintiff's Fourth Amended Complaint, the plaintiff is a Connecticut resident who has been convicted, based on conduct preceding the law's effective date, of an offense that subjects him to the registration and notification requirements of the Connecticut registration law. He alleges that he "is not a dangerous sexual offender and does not pose a threat . . . to the community." Doe also represents a class certified by the district court

on May 18, 2001 that is defined as "all persons who are subject to the registration and public disclosure requirements of Connecticut's sex offender registry act, Connecticut General Statutes §§ 54-250 et seq., without notice and an opportunity to be heard on the question whether they are dangerous."

The defendants are Connecticut agencies and directors or commissioners of those agencies with responsibilities for the administration of the registration act, all of whom are sued in their official capacities.

III. Procedural History

On February 22, 1999, the plaintiff filed suit under 42 U.S.C. § 1983 alleging that Connecticut's sex offender law violates his Fourteenth Amendment right to procedural due process because it deprives him of a liberty interest – his reputation combined with the alteration of his status under state law – without notice or a meaningful opportunity to be heard. He also claims that the law subjects him to punishment for conduct that preceded the date on which the law took effect in violation of the Constitution's Ex Post Facto Clause. *See* U.S. Const. art. I, § 10. The plaintiff also sought to represent two classes, one based on the due process challenge and the other on the ex post facto claim. On behalf of himself and both classes, Doe sought declaratory and injunctive relief prohibiting the State from enforcing the law's registration requirements or publicly disclosing any information contained in the registry.

The plaintiff moved for summary judgment on July 9, 1999. The defendants cross-moved for summary judgment two months later. The district court ruled on these motions

on March 31, 2001, granting summary judgment to the plaintiff on the due process claim and to the defendants on the ex post facto challenge.[15] *See Doe v. Lee*, 132 F. Supp. 2d at 57.

With respect to the due process issue, the court held that the plaintiff had satisfied the "stigma plus" test derived from the Supreme Court's decision in *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976), and had therefore stated a liberty interest protected by the Due Process Clause. *See Doe v. Lee*, 132 F. Supp. 2d at 63-66. The court reasoned that the plaintiff had met the "stigma" portion of this test because "the registry suggests that plaintiff is currently dangerous," *id.* at 63, while he asserts that he is not. The court deemed the "plus" component satisfied by the fact that the registration duties imposed upon the plaintiff altered his status under state law. *See id.* at 64-66. Having thus found that the law deprived the plaintiff of a protected liberty interest, the district court held that the State had not satisfied the mandate of the Due Process Clause because it failed to afford the plaintiff any notice or opportunity to be heard on the issue of his current dangerousness before disclosing his registry information to the public. *See id.* at 66. On the ex post facto claim, the court held that the plaintiff had failed as a matter of law to demonstrate that the registration law was punitive either in purpose or in effect and therefore granted judgment to the defendants. *See id.* at 66-71.

[15] On the same day, the court granted the plaintiff's motion to amend his complaint to add an allegation that he is not dangerous, which the court deemed necessary to resolve the due process issue.

On April 18, 2001, the plaintiff filed motions for certification of the due process claim class, for a declaratory judgment, and either for preliminary and permanent injunctive relief on behalf of the class or, in the alternative, for a preliminary injunction in favor of himself. The court issued a permanent injunction on May 17, 2001, prohibiting the defendants from "disclosing or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class if the information identifies the class member as being included in the Registry" and from "identifying any member of the due process class as being included in the Registry." *Doe v. Lee*, 2001 U.S. Dist. LEXIS 7281, No. 3:99CV314 (D. Conn. May 17, 2001) (order granting permanent injunction). The injunction is limited to public disclosure of the sexual offender registry; it does not prevent law enforcement agencies or officers from obtaining access to the registry or using information it contains for purposes of protecting the public or investigating specific crimes. On May 18, the district court granted the motion for class certification and entered a declaratory judgment in favor of the due process class.

The defendants immediately moved in the district court for a stay of the injunction, which the court denied on May 18, 2001. A divided panel of this Court denied a similar motion after oral argument on June 5, 2001, but expedited the parties' appeal and cross-appeal of the district court's final judgment, which had also been entered on May 18, 2001.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party. *See Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999), cert. denied, 529 U.S. 1098 (2000). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), i.e., "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). A fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law. . . . " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

II. Procedural Due Process Claim

We first address the defendants' appeal from the district court's judgment with respect to the due process claim.

The parties agree, as do we, with the district court's conclusion that the "stigma plus" test, first set forth in *Paul*, governs the defendants' appeal. In *Paul*, the Supreme Court held that in order to state a claim under 42 U.S.C. § 1983 for a violation of the Due Process Clause, a plaintiff who complains of governmental defamation must show (1) the utterance of a statement about him or her

that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement. *See Paul*, 424 U.S. at 701-02, 710-11. This requirement is known in this Circuit and elsewhere as the "stigma plus" test. *See, e.g., Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1302 (11th Cir. 2001); *Cutshall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999); *WMX Techs., Inc. v. Miller*, 197 F.3d 367, 376 (9th Cir. 1999); *Greenwood v. New York*, 163 F.3d 119, 124 (2d Cir. 1998).

A. The "Stigma"

A "stigma" is "[a] mark or token of infamy, disgrace, or reproach. . . . " The American Heritage Dictionary of the English Language 1702 (4th ed. 2000).Publication of the Connecticut Sex Offender Registry plainly "stigmatizes" the people listed on it insofar as it asserts that they are persons convicted of crimes characterized by the State as sexual offenses. But those assertions are concededly true. The gravamen of "stigma" as part of a due process violation is the making under color of law of a reputation-tarnishing statement[16] that is false. *See Codd v. Velger*, 429 U.S. 624, 627, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1977) (per curiam) (holding that plaintiff was not entitled to a hearing with respect to derogatory statements about him because

[16] Defamation and stigma are virtually synonymous. The "stigma plus" test is sometimes referred to in the case law as a "defamation plus" test. *See, e.g., Cannon*, 250 F.3d at 1302; *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 n.3 (9th Cir. 1999); *Greenwood*, 163 F.3d at 123.

"nowhere in his pleadings or elsewhere has [he] affirmatively asserted that the [statements in issue were] substantially false"); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 446 (2d Cir. 1980) ("To constitute deprivation of a liberty interest, the stigmatizing information must be both false . . . and made public . . . by the offending governmental entity.") (alterations in original; citation and internal quotation marks omitted). The plaintiff therefore asserts not merely stigma, but false stigma: that the Connecticut law "violates [his] due process rights by stigmatizing [him] as [a] presently dangerous sex offender[ ]," which he maintains is false and gives him a right to a hearing comporting with due process requirements to provide him with an opportunity to prove that he is not in fact a present threat to public safety. Appellee's Br. at 7 (emphasis added); *see also Doe v. Lee*, 132 F. Supp. 2d at 63 ("Plaintiff contends that he is stigmatized because his inclusion in the registry conveys the false message that he is a dangerous sex offender and a threat to public safety.")

To meet the stigma element of his claim, then, the plaintiff is required to show a stigmatizing statement about him made or to be made undercolor of law that is capable of being proved true or false. He has only to allege, not prove, that the statement is false in order to establish a due process right to the hearing he seeks. *See Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 43 (2d Cir. 1987). It is at such a hearing that the plaintiff would have the opportunity to have his name cleared and the false stigma thus avoided.

The district court concluded that the plaintiff met the stigma element of his claim. The court's opinion is not entirely clear, however, as to how public dissemination of the registry falsely stigmatizes the plaintiff. We read the

court's decision as containing two possible explanations: that the registry implies that every person listed therein is in fact dangerous; and that it implies that some of the registrants are dangerous and that each individual registrant is more likely than the average person to be currently dangerous.

As to the first of these possibilities, the court, echoing the plaintiff's argument, stated:

> The stigma question . . . [is] whether, assuming plaintiff is not dangerous, public dissemination of the sex offender registry conveys the erroneous message that he is. The answer to this question must be yes. Despite the accuracy of the registry data concerning the plaintiff and the statement on the web site that no determination of any individual's dangerousness has been made, the registry suggests that plaintiff is currently dangerous.

Doe v. Lee, 132 F. Supp. 2d at 63. The defendants respond that "the inference of dangerousness the district court drew, and that it assumes the public will draw, from the accurate and public information [contained in the registry] is not supported by any facts in the record." Appellants' Br. at 25. They argue that, to the contrary, by including in the website version of the sexual offender registry the statement that the DPS has made no determination that the persons included are "currently dangerous," the State has specifically negated this inference. *Id.* at 25-26.

We share some of the State's doubt as to whether, as a matter of law, public dissemination of the registry implies to any particular reader, its average reader, or to "an appreciable fraction" of its readership, *Peck v. Tribune Co.*, 214 U.S. 185, 190, 53 L. Ed. 960, 29 S. Ct. 554 (1909) (Holmes, J.) (defamation action), that every listed person,

including the plaintiff, is currently dangerous. The registry purports to be a list of virtually all offenders convicted of covered crimes, not only presently dangerous sex offenders. The website disclaimer enforces that notion, at least to those visitors to the website who actually read it, by implying that the site includes both dangerous and non-dangerous offenders. While the registry thus necessarily communicates the idea that registrants committed covered offenses and thereby implies that they may pose a current danger, we cannot conclude on the record before us that visitors to the website necessarily understood it to say or imply that all of the registrants are in fact currently dangerous. Our inability to reach that conclusion is exacerbated by the fact that the website has been shut down and we have no means to examine the registry in the form and context in which actual readers would have viewed it.

But the district court also said:

> The stated purposes of the [law] are to protect the public and facilitate law enforcement. Registration and dissemination serve these goals only because some registrants are likely to reoffend. Thus, the message that some registrants are currently dangerous is, and is intended to be, communicated to viewers of the registry. *Doe v. Lee*, 132 F. Supp. 2d at 64 (emphasis added)

(footnote omitted). With this we agree. The sexual offender registry conveys the message that some of the persons listed on the registry are currently dangerous; disclosing the identity of persons who are currently a threat to public safety is the sole avowed and legitimate purpose of the registry. Even the disclaimer itself, by asserting that the DPS "has made no determination that any individual included in the Registry is currently dangerous," clearly implies that some may be. But the list is undifferentiated;

it does not say which registrants are or may be currently dangerous and which are not.

We think that it follows that publication of the registry implies that each person listed is more likely than the average person to be currently dangerous. That implication seems to us necessarily to flow from the State's choice of these particular individuals about whom to disseminate information, a record as to their sex offences, and information as to their current whereabouts. This implication stigmatizes every person listed on the registry. And the plaintiff claims that, as to him, it is false.

If the "plus" factors are present – a question to which we will turn shortly – then the plaintiff is entitled to due process in the form of a hearing at which he would have the opportunity to establish that he is not particularly likely to be dangerous and therefore should not be listed in a publicly disseminated registry in a way that falsely implies otherwise.

The State of Connecticut contends that by enjoining the publication of the information on the registry, the district court was doing no more than enjoining the dissemination of truthful information about the criminal history of the registrants. That would be troubling if it were so.[17] We would be deeply concerned about a federal

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[17] The injunction by a court of statements like those contained in the sexual offender registry made by a private individual, a classic prior restraint, would be highly suspect particularly insofar as the statements at issue were true. "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976). They carry "a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v.*

(Continued on following page)

court's order the purpose of which was to require the State of Connecticut to keep truths from its citizens. *Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) (deprecating as "highly paternalistic" a state law that, in violation of the First Amendment, sought to protect consumers by prohibiting truthful advertising). We conclude, however, that the district court's order does not target truthful speech. Publication of the registry in its present form implies that persons listed on the registry are particularly likely to be currently dangerous. Unless everyone on the registry is particularly likely to be dangerous, a proposition that the State neither asserts nor embraces, that implication is not true.

The listings alone, true or false – the "stigmatizing" by the State – are not, under Paul, actionable as due process violations. But if "plus" factors are present, the plaintiff is entitled to due process to establish whether the implication of likely dangerousness, as applied to him, is false and to prevent its communication to the public until he has had that opportunity and has failed.

Sullivan, 372 U.S. 58, 70, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963). But the parties have not addressed whether a similar analysis is to be engaged in where, as here, a federal court enjoins a state government or official from making statements some of which may be truthful. *Cf. Reno v. Condon*, 528 U.S. 141, 145 L. Ed. 2d 587, 120 S. Ct. 666 (2000) (holding that federal statute that prohibited states from disseminating accurate motor vehicle information was not unconstitutional under the Commerce Clause or principles of federalism, without discussing First Amendment implications, if any).

B. The "Plus" Factors

Having isolated the "stigma" that the Connecticut sexual offender registry law visits on registrants, then, we must inquire whether there is a "plus" factor that gives rise to a liberty interest under the Due Process Clause.

1. Immunity and employment termination precedents. Although we have applied the "stigma plus" test many times, *see, e.g., Greenwood*, 163 F.3d at 123-24; *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 630-33 (2d Cir. 1996), *cert. denied*, 519 U.S. 1150, 137 L. Ed. 2d 218, 117 S. Ct. 1083 (1997); *Valmonte v. Bane*, 18 F.3d 992, 998-1002 (2d Cir. 1994); *Martz v. Inc. Vill. of Valley Stream*, 22 F.3d 26, 31-32 (2d Cir. 1994); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1062-63 (2d Cir.), *cert. denied*, 510 U.S. 865, 126 L. Ed. 2d 144, 114 S. Ct. 185 (1993); *Easton v. Sundram*, 947 F.2d 1011, 1016-17 (2d Cir. 1991), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 548, 112 S.Ct. 1943 (1992); *Neu v. Corcoran*, 869 F.2d 662, 665-70 (2d. Cir.), *cert. denied*, 493 U.S. 816, 107 L. Ed. 2d 33, 110 S. Ct. 66 (1989), the import of the "plus" component remains somewhat unclear. *See Neu*, 869 F.2d at 667 (noting that the meaning of *Paul* is "not unambiguous" and that "it is not entirely clear what the 'plus' is"). As we noted in *Valmonte*, 18 F.3d at 1000, this uncertainty arises in part because many of our cases involving "plus" factors were resolved on the basis of a qualified immunity defense. We often elided the issue of whether the defendant had deprived the plaintiff of a liberty interest, concluding that the defendant was in any event entitled to prevail on grounds of qualified immunity because any such interest was not clearly established at the time of the alleged violation. *See, e.g., White Plains Towing Corp.*, 991 F.2d at

1063-64; *Easton*, 947 F.2d at 1015-16; *Neu*, 869 F.2d at 665, 667.[18]

In addition, our cases have typically addressed "stigma plus" claims in the context of termination of government employment. *See, e.g., Greenwood*, 163 F.3d at 123-24; *Donato*, 96 F.3d at 630-33; *Martz*, 22 F.3d at 32; *Brandt*, 820 F.2d at 45; *Baden v. Koch*, 799 F.2d 825, 831 (2d Cir. 1986); *Quinn*, 613 F.2d at 445-47; *Gentile v. Wallen*, 562 F.2d 193, 197-98 (2d Cir. 1977); *Huntley v. Cmty. Sch. Bd.*, 543 F.2d 979, 985-86 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977). These cases yield principles that are sometimes difficult to apply in delineating "plus" factors in other contexts. This appears to result at least in part from the fact that the government-employment line of cases harks back to the Court's pre-*Paul* decision in *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). There, the Court observed that although a teacher's termination from public employment does not implicate a liberty interest, it might if the state were to impose "on [the plaintiff] a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities." *Id.* at 573. In termination cases, courts have found based on *Roth* that it is the termination that is the "plus" factor establishing a due process violation and the right to a "name-clearing hearing." *See, e.g., Donato*, 96 F.3d at 630-31. In the case before us, there is no termination of government employment. We therefore

[18] We note that these cases were decided before the Supreme Court first "expressed its preference that courts address first the merits of the constitutional claims presented before turning to an analysis of qualified immunity." *Medeiros v. O'Connell*, 150 F.3d 164, 169 (2d Cir. 1998) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)).

look for an understanding of the meaning and function of the "plus" factors by reviewing the history, language, and apparent meaning of *Paul* and its progeny.

2. "Stigma plus" from *Constantineau* to *Paul*. Prior to *Paul*, the concept of "liberty" in the Due Process Clause of the Fourteenth Amendment appears to have been widely understood to encompass a person's interest in his or her good name and reputation, without more. See Laurence H. Tribe, American Constitutional Law § 10-9 (2d ed. 1988). That principle seemed to be established by the Supreme Court's decision in *Wisconsin v. Constantineau*, 400 U.S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971). At issue there was a Wisconsin statute that allowed local officials to post in liquor stores a list of persons who became dangerous after heavy drinking and to forbid persons on the list from purchasing alcohol for one year. The officials were not required to notify targeted persons or allow them to be heard on the issue of whether they deserved the "badge of infamy" that the list imposed upon them. *Id.* at 437. The Court invalidated the statute, stating that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Id. At the heart of the Court's reasoning was the recognition that inclusion on the posted list may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the [statute], a resident . . . is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

Id. Chief Justice Burger and Justice Blackmun dissented on procedural grounds but agreed with the majority that "the Wisconsin statute appears, on its face and in its application, to be in conflict with accepted concepts of due process," and that the Court's decision on the merits therefore "very likely ... reaches a correct result." *Id.* at 440 (Burger, C.J., dissenting). The Supreme Court seemed to reaffirm these "accepted concepts" in two cases decided over the ensuing several years. In *Roth*, the Court declined to find a protected liberty interest in the termination of a non-tenured teacher's employment at a public university but suggested that such an interest would be implicated if the state imposed "on [the plaintiff] a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573. Citing *Constantineau*, the *Roth* Court observed that the state "did not make any charge against [the plaintiff] that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so," the Court reasoned, "this would be a different case." *Id.* As we have noted, this comment in *Roth* became the principal foundation for the jurisprudence of due process claims in connection with defamation (or "stigma") associated with termination of public employment.

Three years later, in *Goss v. Lopez*, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975), the Court held that students were entitled to due process before being suspended from public school on charges of misconduct. In addition to recognizing a property interest in the students' "legitimate entitlement to a public education," the Court appeared to conclude that the students had an independent liberty interest in their reputations. *Id.* at 574. Again citing *Constantineau*, the Court reasoned that the school's

charges of misconduct "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Id.* at 575. "The claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution." *Id.*

In its 1976 decision in *Paul*, the Court revisited the issue of government-imposed stigma and reoriented this precedent. The Court addressed a municipal police department's practice of circulating to local merchants flyers displaying photographs of persons deemed to be "active shoplifters." *See Paul*, 424 U.S. at 695. One such suspected shoplifter filed suit under 42 U.S.C. § 1983, alleging that under *Constantineau* the distribution of a flyer containing his photograph violated the Due Process Clause because it damaged his reputation without affording him the necessary procedural protections. *See id.* at 696-97.

Writing for the majority, then-Justice Rehnquist rejected this claim, declaring that contrary to the plaintiff's view of *Constantineau*, an individual's "interest in reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Paul*, 424 U.S. at 712. The Court acknowledged that it had "in a number of ... prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts." *Id.* at 701. But in each such case, the Paul Court reasoned, a liberty interest was implicated only because the state had not only stigmatized the plaintiff, but had also impaired or altered some other "more tangible interest[ ]," such as "a right or status previously recognized by state law." *Id.* at 701, 711. Thus, the Court observed, the deprivation in *Constantineau* was stigma plus the loss of the right,

previously recognized under state law, to purchase alcohol; in *Roth*, the Court would have found a liberty interest implicated by stigma only if it was combined with termination of government employment; and in *Goss*, "liberty" was involved only because there was stigma plus the extinguishment of the state-law right to public education.

Undergirding this analysis was the concern that a construction of the Due Process Clause under which damage to reputation alone could implicate a liberty interest "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." *Id.* at 699. The Court noted that the plaintiff's complaint "would appear to state a classical claim for defamation actionable in the courts of virtually every State," and that "if the same allegations had been made about [the plaintiff] by a private individual, he would have nothing more than a claim for defamation under state law." *Id.* at 697, 698. Only on the basis of the fortuity that a state actor rather than a private party had made the defamatory comment could the plaintiff argue that his suit was "transmuted into one for deprivation . . . of rights secured under the Fourteenth Amendment." *Id.* at 697-98. Allowing that fortuity alone to establish a constitutional claim, the Court reasoned, would in effect render § 1983 "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701.

Paul's interpretation of decisions like *Constantineau*, *Roth*, and *Goss* was thus driven at least in part by "evident concern for values of federalism," Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*,

90 Harv. L. Rev. 1065, 1101 n.135 (1977), and more specifically by a resolve to prevent § 1983 from "supplanting traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society," *Daniels v. Williams*, 474 U.S. 327, 332, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). The Court sought, through *Paul*, to maintain "the delicate balance between state and federal courts and [to respect] the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by the common law and the laws of the States, as well as by the Constitution." *Albright v. Oliver*, 510 U.S. 266, 284, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) (Kennedy, J., concurring in the judgment).

The requirement that a plaintiff demonstrate some "plus" factor – an alteration or impairment of "a right or status previously recognized by state law," *Paul*, 424 U.S. at 711 – appears to be central to this effort. If, as some thought before *Paul*, the Fourteenth Amendment notion of "liberty" encompassed an individual's unadorned interest in his or her reputation, then the issue whether an allegation of "stigma" stated a federal constitutional or state-law claim would depend entirely on whether the defendant happened to be a state officer or a private citizen. A plaintiff who was defamed by a private defendant could sue only in state court on a state law claim; a plaintiff who was defamed by a government actor could sue in federal court on a federal claim. Such a regime would "trivialize the centuries-old principle of due process" by enlarging the scope of the Fourteenth Amendment beyond the type of "arbitrary exercise of the powers of government" against which that provision was intended to guard, *Daniels*, 474 U.S. at 332, 331 (internal quotation marks omitted), while, at the same time, invading the domain of the states by permitting a plaintiff to bypass common-law tort regimes in favor of the

"heavy artillery of constitutional litigation," *Steuart v. Suskie*, 867 F.2d 1148, 1150 (8th Cir. 1989).

The "plus" requirement avoids this result by ensuring that a plaintiff cannot allege as a deprivation of a constitutionally protected liberty interest an injury that could have been inflicted by a private citizen in a position analogous to the state actor. If the plaintiff can point to some material indicium of government involvement beyond the mere presence of a state defendant to distinguish his or her grievance from the garden-variety defamation claim, courts can be assured that § 1983 will not become "a body of general federal tort law" duplicative of "whatever systems may already be administered by the States." *Paul*, 424 U.S. at 701.[19]

Two sources lend further support to this understanding of the "plus" requirement. The first is *Siegert v. Gilley*, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991), the only Supreme Court decision to apply and elaborate on the meaning of *Paul*. In an opinion by Chief Justice Rehnquist, the *Siegert* Court held that the plaintiff, a clinical psychologist who had voluntarily resigned from his post at one government hospital and was seeking to be "credentialed" at another, had not established a liberty interest arising from an allegedly defamatory letter

[19] The Connecticut law considered on this appeal provides broad immunity from civil suit for persons and entities involved in the maintenance and dissemination of the registry. *See* Conn. Gen. Stat. § 54-258(b). The provision of a remedy through § 1983 therefore would not overlap with any remedy provided by the State but rather interfere with the power of the State to establish that there shall be no remedy in specified circumstances.

written by his former supervisor to a prospective government employer. *See Siegert*, 500 U.S. at 227-29. The Court explained:

> The statements contained in the letter would undoubtedly damage the reputation of one in [the plaintiff's] position, and impair his future employment prospects. But the plaintiff in *Paul v. Davis* similarly alleged serious impairment of his future employment opportunities as well as other harm. Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a [constitutional] action. *Id.* at 234.

The Court did not suggest that the requisite tangible interest or burden needs to meet some threshold of substantiality or that it must implicate a certain kind of interest, but rather that it must at least entail some non-trivial state involvement that removes the plaintiff's complaint from the realm of traditional state-law defamation. Although "defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation," *id.* at 233 (emphasis added), an allegation of defamation brigaded with other government action adversely affecting the plaintiff's interests properly invokes the protections of the Due Process Clause and therefore states a claim under § 1983.

The second source of support for our reading of the "plus" component is the Supreme Court's decision in *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), *overruled in part on other grounds by*

Daniels, 474 U.S. at 330-31. In *Parratt*, the Court held that where, through a state official's misconduct, a plaintiff is stripped of property in circumstances in which pre-deprivation process is not feasible and the post-deprivation remedy provided by the state is adequate, the plaintiff may not bring a § 1983 action for violation of his or her procedural due process rights. *See Parratt*, 451 U.S. at 541-44. In such circumstances, the Court held, the state post-deprivation remedy provides all the process that is due.

The rationale underlying *Parratt* parallels that of *Paul*: "To accept [plaintiff's] argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." *Id.* at 544. Indeed, *Parratt* quoted *Paul* for the proposition that permitting constitutional suits on the basis of random and unauthorized actions by state officials when post-deprivation remedies are adequate "'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Id.* (quoting *Paul*, 424 U.S. at 701).

The Supreme Court has since suggested a relationship between the *Paul* and *Parratt* analyses, *see Daniels*, 474 U.S. at 332-33, and courts cite the two for the proposition that "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989); *see also, e.g.,*

Mahoney v. Kesery, 976 F.2d 1054, 1060 (7th Cir. 1992) (citing *Paul* and *Parratt* for the assertion that "the Supreme Court has been emphatic that not every tort committed by public officers is actionable under the Constitution, even though every one could be thought to deprive the tort's victim of an interest in the nature of liberty or property"). We therefore look to our interpretation of *Parratt* as a proper source of guidance on the import of *Paul*.

In *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986), we held that *Parratt* does not apply to substantive due process claims because substantive due process violations are "'complete as soon as the prohibited action is taken'" and therefore do not depend upon the adequacy of any pre- or post-deprivation remedies. *McClary*, 786 F.2d at 86 n.3 (quoting *Daniels*, 474 U.S. at 338 (Stevens, J., concurring in the judgment)). But this conclusion could effectively swallow the *Parratt* rule, at least in those cases – such as *McClary* itself, where the plaintiff's decedent lost his life – in which a plaintiff whose procedural due process suit would be barred by *Parratt* could instead plead the claim as one for a violation of substantive due process. *See* 786 F.2d at 88-89; *see also Albright*, 510 U.S. at 285 (Kennedy, J., concurring in the judgment) (observing that *Parratt* could be avoided by "attaching a substantive rather than procedural label to due process claims"). This would thwart the purpose of *Parratt* by permitting federal constitutional claims to proceed on the basis of conduct that the Court has deemed insufficient when framed in procedural terms.

Our analysis in *McClary* parallels a federalism-based interpretation of the *Paul* "plus" factors. We were presented in *McClary* with both substantive and procedural

due process claims against state and county officials brought by the administratrix of the estate of a highway worker who was killed by a falling crane while working on a government project. 786 F.2d at 84-85. We first rejected the procedural due process claim on the basis, inter alia, of *Parratt*, *Id.* at 86-88, and then turned to "the more difficult question . . . [at] the heart of this case": "when a deprivation of life or liberty assumes constitutional dimensions" for purposes of substantive due process. *Id.* at 88.

We began our discussion by observing that the Due Process Clause was designed to guard against abuses of "governmental power." *Id.* (citation and internal quotation marks omitted). We then noted that, as was the case in *Daniels*, no such abuse of state authority had been alleged; "the only fact distinguishing [the plaintiff's complaint] from an ordinary tort action . . . is the identity of [the defendant]." *Id.* at 89. We reasoned that where "identical actions could have been carried out by a private [defendant], for the same reasons and with the same regrettable consequences," substantive due process was not implicated. *Id.* Only where the defendant's action is "governmental in nature" – where "a government official, because of his unique position as such, was able to impose a loss" – would the protections of the Fourteenth Amendment come into play. *Id.* (internal quotation marks omitted). Because the plaintiff could not point to any state activity in the case beyond the mere presence of a state defendant, we dismissed her claim on the ground that "the substantive component of the Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." *Id.*

McClary thus held that a plaintiff pleads a deprivation of an interest protected by substantive due process only when he or she demonstrates some state action that distinguishes the allegation from an ordinary tort claim. On similar reasoning, we hold that a plaintiff establishes a "plus" factor for purposes of the *Paul v. Davis* "stigma plus" test only if he or she points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit.

3. The "plus" factor in this case. Applying this holding to the case before us, we agree with the district court that the statutory registration duties imposed on the plaintiff constitute a "plus" factor. Those obligations (1) alter the plaintiff's legal status, and (2) are "governmental in nature," *cf. McClary*, 786 F.2d at 89, insofar as they could not be imposed by a private actor in a position analogous to the state defendants, and therefore differentiate the plaintiff's complaint from a traditional defamation claim brought under state law.

The registration duties imposed by Connecticut's sex offender law are extensive and onerous. With a few exceptions, a person who is required to register because he or she was convicted of a criminal act against a minor, a nonviolent sexual offense, or a felony with a sexual purpose must verify his or her address annually for ten years. *See* Conn. Gen. Stat. §§ 54-251(a), 54-253(a), 54-254(a), 54-257(c). Anyone who was convicted of a sexually violent offense must do so every ninety days for the rest of his or her life. *See Id.* §§ 52-252(a), 54-253(a), 54-257(c). To conduct this verification, the state mails to a registrant's last known address a nonforwardable form that the registrant must complete and return within ten days of

receipt. *See Id.* § 54-257(c). "In the event that a registrant fails to return the address verification form, the Department of Public Safety shall notify the local police department or the state police troop having jurisdiction over the registrant's last reported address, and that agency shall apply for a warrant to be issued for the registrant's arrest. . . ." *Id.*

Whenever any registrant changes his or her address, he or she must notify the Commissioner of Public Safety within five days. *See Id.* §§ 54-251(a), 54-252(a), 54-254(a). If he or she "regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling," he or she must notify the Connecticut Commissioner and register with the appropriate agency in the other state. *Id.* The registrant must also provide blood samples for purposes of DNA analysis when he or she is first registered and must appear at a specified location to have his or her photograph taken whenever the Commissioner requests, *see Id.* §§ 54-250(3), 54-251(a), 54-252(a), 54-253(b),(c), 54-254(a), but at least once every five years, *see Id.* § 54-257(d). Failure to abide by any of these obligations constitutes a class D felony, punishable by up to five years in prison. *See Id.* §§ 54-251(d), 54-252(b), 54-253(c), 54-254(b).

We think that these obligations, taken together, easily qualify as a "plus" factor under *Paul*. The imposition on a person of a new set of legal duties that, if disregarded, subject him or her to felony prosecution, constitutes a "change of [that person's] status" under state law. *Paul*, 424 U.S. at 712. Such action is quintessentially "governmental in nature." *McClary*, 786 F.2d at 89 (citation and internal quotation marks omitted). Moreover, the presence

of such an alteration of the registrant's legal rights and duties serves the federalism-based function of the "plus" factor: to ensure that the plaintiff cannot convert a state-law defamation claim into a § 1983 action because of the mere fortuity that he or she is suing a state defendant. The injury that the plaintiff alleges in this case – stigma plus an alteration in his or her state-law duties and status – could not have been inflicted by a private person in a position analogous to that of the state. Only a defendant employing his or her "power as a state official" could impose and enforce the duties inherent in Connecticut's sexual offender registry law and then publish the information obtained by those state-imposed duties. *Id.* (emphasis in original).

The defendants assert that "every federal court that has addressed the issue has held that no liberty interest is implicated in such a context." Appellants' Br. at 23. They are incorrect. Prior to the district court's decision in this case, three other district courts – including one in the Southern District of New York – have used similar reasoning to identify a protected liberty interest under the "stigma plus" test. *See Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999) (concluding that the imposition of new legal duties and the extinguishment of other rights, including "the right [to] establish a new residence without giving prior notice to government officials," constitute a "plus" factor); *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998) ("In light of these requirements placed on registrants, there can be no genuine dispute that registration alters the legal status of all convicted sex offenders subject to the Act. . . . These requirements obviously encroach on the liberty of convicted sex offenders, and, therefore, they suffer a tangible impairment of a right in

addition to mere harm to reputation."); *W.P. v. Poritz*, 931 F. Supp. 1199, 1219 (D.N.J. 1996) (noting that "stigma plus" can be established "by coupling the reputational damage with the . . . continuing legal status as a registrant and the duties imposed as a result"), *rev'd on other grounds sub nom. E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

Since oral argument of this appeal, moreover, the United States District Court for the District of Columbia has held that a sex offender registry statute similar to Connecticut's infringes upon a protected liberty interest because its registration requirements and long period of supervised release impose an "extraordinary breadth and extent of . . . burdens" which, when combined with reputational harm, satisfy the "stigma-plus" test. *Doe v. Williams*, 167 F. Supp. 2d 45, 2001 U.S. Dist. LEXIS 21699, 2001 WL 1241960, at *7, slip op. at 13, (D.D.C. 2001).

In addition, the Third Circuit has identified a protected liberty interest in these circumstances, albeit by relying upon a state-created right to privacy rather than the statutory obligations imposed on registrants. *See E.B. v. Verniero*, 119 F.3d 1077, 1105 (3d Cir. 1997); *see also Roe v. Farwell*, 999 F. Supp. 174, 196-97 (D. Mass. 1998) (same). State courts, including the Supreme Court of New Jersey in the seminal case of *Doe v. Poritz*, 142 N.J. 1, 99-106, 662 A.2d 367, 417-21 (1995), have reached a similar conclusion.

It is true that the Sixth and Ninth Circuits have not found a liberty interest in analogous circumstances. *See Cutshall*, 193 F.3d at 479-82; *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997). A substantial number of district courts have held similarly. *See, e.g., Corbin v. Chitwood*,

145 F. Supp. 2d 92 (D. Me. 2001); *Akella v. Mich. Dep't of State Police*, 67 F. Supp. 2d 716 (E.D. Mich. 1999); *Femedeer v. Haun*, 35 F. Supp. 2d 852 (D. Utah 1999), *aff'd in part, rev'd in part*, 227 F.3d 1244 (10th Cir. 2000); *Lanni v. Engler*, 994 F. Supp. 849 (E.D. Mich. 1998); *Doe v. Kelley*, 961 F. Supp. 1105 (W.D. Mich. 1997). However, these courts have not necessarily disagreed with the contention that the ongoing legal obligations of sex offender registrants constitute a "plus" factor. Neither the Sixth Circuit in Cutshall nor the Ninth Circuit in *Russell* was presented with such an argument. Instead, the plaintiff in each of those cases claimed that the "plus" factor consisted of the state's intrusion on his or her right to privacy. *See Cutshall*, 193 F.3d at 479; *Russell*, 124 F.3d at 1093-94. *See also Williams*, 167 F. Supp. 2d 45, 2001 U.S. Dist. LEXIS 21699, at *56-*57, 2001 WL 1241960, at *9, slip op. at 19-20 (making similar observations about, inter alia, *Cutshall* and *Russell*).

The defendants challenge the conclusion that the Connecticut sexual offender law satisfies the "plus" requirement on two grounds. First, they allege that the registration requirements constitute only a "minimal burden" on registrants, an intrusion no more onerous than that which the federal and state tax laws impose on all citizens and no more inconvenient than the type of obligations one encounters when completing census questionnaires or renewing a driver's license. The notion that meeting the burdens of the Connecticut registry law, which we have described in some detail, is comparable to paying taxes or complying with census and driving registration regulations is breathtaking. But in any event, as we have explained, the dispositive issue is neither the degree of burden inherent in the proffered "plus" factor nor

the substantiality of the interest, right, or status affected thereby. Rather, at least when the governmental action is not trivial, the inquiry turns on the character of the action on which the plaintiff seeks to establish the "plus" component. Where, as here, that action is "governmental in nature" – a characterization supported by the defendants' comparison of the registration requirements to other obligations only the government can impose – it constitutes a "plus" factor that triggers constitutional protection.

Second, the defendants argue that the registration requirement's relation to the stigma is too attenuated to constitute a "plus" factor. The defendants point out that the stigma arises not from the registration requirement but rather from the publication of the registration information. They contend that the harm of stigma and the additional tangible burden of the "plus" factor must arise from the same government act. In a similar vein, the defendants point out that a hearing permitting the plaintiff to establish that he is not dangerous would remedy only the stigma while leaving the registration requirement intact. According to the defendants, this demonstrates that the "plus" factor in this case is insufficient.

We are unpersuaded by this argument. Our cases have not required the plaintiff to seek a remedy for both the stigma and the "plus" factor. *See, e.g. Donato*, 96 F.3d at 633 ("A hearing must be held for the limited purpose of giving a discharged employee an opportunity to clear her name. . . . The employer need not rehire the employee even if she can prove the inaccuracy of the stigmatizing allegations."); *Brandt*, 820 F.2d at 43 fired government employee sought a name-clearing hearing but not reinstatement to his position). And we have never required that the stigma and the "plus" factor arise from a single government act.

Indeed, in the government employment context, we have required only a "concurrent temporal link" between the separate acts of termination and defamatory statements. *See Martz*, 22 F.3d at 32 (collecting cases); *see also Brandt*, 820 F.2d at 44-45 (finding a liberty interest implicated where a government employee had been terminated but where the government had not published the reasons for the termination and the alleged stigma was merely a possible future event).

We think that the temporal nexus between the stigma and the "plus" factor in this case is sufficiently close to support a liberty interest. The information published by the State is obtained by means of the registration requirement, and a person can be stigmatized by publication of the registry only if he or she is first subjected to that requirement. The "plus" factor is thus a necessary condition for the stigmatization. *Cf. Valmonte*, 18 F.3d at 1002 (finding a liberty interest implicated where the state's stigmatizing charges of suspected child abuse were "coupled with a statutory impediment mandating that employers justify hiring" an individual so charged).

Our reason for rejecting the defendants' argument becomes even clearer in light of the "plus" factor's function of reserving the "heavy artillery" of the Due Process Clause for those cases involving uniquely governmental conduct. The requirement that sexual and other offenders register with the State – a requirement that can only be imposed by the State and that is a necessary predicate for the stigmatizing publication of the registry – places this case in that category.

III. Ex Post Facto Claim

The plaintiff cross-appeals the district court's grant of summary judgment to the defendants on his claim that the registration requirement constitutes a punishment in violation of the Ex Post Facto Clause of Article I, section 10 of the Constitution.[20] The district court observed that the Clause prohibits states from applying a new penal sanction to a crime that has already been committed. *See Doe v. Lee*, 132 F. Supp. 2d at 66 (citing *Kansas v. Hendricks*, 521 U.S. 346, 370, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997)); *see also Pataki*, 120 F.3d at 1272. In performing its analysis of the Connecticut law under the Ex Post Facto Clause, the court turned to our decision in *Pataki*, which established a two-part test to determine whether the law in issue is penal: "first, whether the legislature intended the statute to be criminal or civil; and, second, if the intent was nonpunitive, whether the statute is so punitive in fact that it cannot legitimately be seen as civil in nature." *Doe v. Lee*, 132 F. Supp. 2d at 66 (citing *Pataki*, 120 F.3d at 1274-75).

With respect to the first part of the test, the district court canvassed the "limited legislative history materials" supplied to it by the parties and held that it does not indicate a punitive legislative purpose. 132 F. Supp.2d at 67. The court noted that "there is nothing in the text [of the law] that suggests the legislature sought to punish sex offenders rather than protect public safety." *Id.* It also observed differences between the New York sex offender

[20] Art. I, @ 10 of the Constitution provides, in relevant part: "No State shall . . . pass any . . . ex post facto law. . . ."

registration law at issue in *Pataki* and the Connecticut law, including the fact that the former, unlike the latter, provided for individualized assessment of the dangerousness of the registrant. *See Id.* at 67-68. The court concluded that the "differences, taken separately or cumulatively and viewed in light of the [Connecticut] legislative history and the structural features indicating a regulatory purpose, do not demonstrate that the legislature acted with punitive intent" in adopting the law. *Id.* at 68. We find no basis upon which to disagree.

With respect to the second part of the *Pataki* test – whether, although regulatory in intent, the registry law is punitive in fact – the district court, citing *Pataki*, held that a fact-specific inquiry is required, but that only "the clearest proof" would suffice to meet the test. *Doe v. Lee*, 132 F. Supp. 2d at 68 (internal quotation marks omitted in original). In making the punitive-in-fact determination, the district court consulted the factors set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963).[21] The court considered two aspects of the Connecticut law that the plaintiff argued indicated a "punitive effect": first, the fact that its registration requirement applies to behavior that is already a crime, and second, a perceived "excessiveness"

[21] The Mendoza-Martinez considerations are whether the sanction (1) involves an affirmative disability or restraint, (2) has historically been regarded as a punishment, (3) comes into play only on a finding of scienter, (4) will promote the traditional aims of punishment – retribution and deterrence, (5) applies to behavior that is already a crime, (6) may rationally be connected to an alternative, nonpunitive purpose, and (7) appears excessive in relation to that alternative purpose. *Doe v. Lee*, 132 F. Supp. 2d at 68 n.28.

of its dissemination of information via the Internet. *Doe v. Lee*, 132 F. Supp. 2d at 68-70. The court concluded: "Neither of these factors by itself, nor the two in combination, establishes by the 'clearest evidence' that the law is punitive in fact." *Id.* at 68.

As to the first, the fact that registration is triggered by conviction, the district court held that that could not be enough to render the statute punitive in fact because that characteristic is "common to all regulatory disabilities that follow from a prior conviction, such as the loss of the right to vote." *Id.* at 69. "The [Supreme] Court has found such a link insufficient to establish unconstitutionality." *Id.* (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365-66, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984); *United States v. Ward*, 448 U.S. 242, 250, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980)).

The district court also disagreed with the plaintiff's position that the asserted "excessiveness" of the registry scheme, principally the use of a website for dissemination, made it punitive in fact.

There can be no doubt that Internet availability of registry information is rationally related to the goals of public safety and law enforcement. Indeed, use of the Internet is the most efficient means of making the information available to residents of the state, and it will become more efficient as Internet accessibility increases over time. Because use of the Internet furthers these nonpunitive purposes, this feature of the [statute] is insufficient to render the statute punitive in fact. *Id.* (citation omitted.)

Unlike the question of legislative intent, the punitive-in-fact aspect of the Connecticut sex offender registry

statute as written is problematic. We acknowledged in *Pataki* that there "the question [was] not free from doubt," 120 F.3d at 1265. We ultimately held, however, that New York's version of a sex offender registration law did not violate the Ex Post Facto Clause, but we based our holding as to the punitive-in-fact inquiry significantly on the tiered structure of the New York law under which the degree of harshness with which registering offenders are treated depends on an individualized assessment of the level of risk to the community posed by each of them. *See Id.* at 1281-83. Connecticut's law provides for no such individualized assessment, a fact at the core of the plaintiff's challenge to it here. *Cf. Doe v. Otte*, 259 F.3d 979, 991 (9th Cir. 2001) (striking down Alaska sex offender registry law similar to Connecticut's on ex post facto grounds, calling it "highly significant" that the statute was not limited to persons "posing a future risk to the community.")

But we need not and do not decide whether, because of the undifferentiated nature of the Connecticut law, the Connecticut statute as written is punitive-in-fact under ex post facto analysis. We have today affirmed the court's injunction under the Due Process Clause prohibiting the State from disseminating sex offender registry information without giving persons on the registry an opportunity to avoid being listed in a manner suggesting that he or she is probably currently dangerous by establishing that he or she is not. The State of Connecticut therefore stands enjoined from enforcing the registry law in the manner that might also render it punitive-in-fact and therefore unconstitutional under the Ex Post Facto Clause.

In order to provide for a sex offender registry and its dissemination consonant with the injunction that we affirm today, Connecticut will likely adopt new procedures

more sensitive to whether those on a widely disseminated registry are likely to be currently dangerous. The State may choose a scheme clearly permissible under the Ex Post Facto Clause under Pataki. Indeed, it could adopt a law constitutionally indistinguishable from that which we upheld on ex post facto grounds in that case. The plaintiff may of course challenge any new Connecticut law or procedure to determine whether it is consonant with the Ex Post Facto Clause. It will be soon enough to address the issue then.

IV. The Injunction

The district court granted the permanent injunction requested by the plaintiff. The injunction principally prohibits the defendants from "disclosing or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class [including the plaintiff] if the information identifies the class member as being included in the Registry," and from "identifying any member of the due process class as being included in the Registry." *Doe v. Lee*, No. 3:99CV314. In arriving at the terms of the injunction, the district court was required to "tailor the remedy to fit the nature and extent of the violation." *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1235 (2d Cir. 1987). We conclude that because it is the communication to the public of the fact that the plaintiff (and other members of the class) is in the registry, without a hearing as to the current danger that the plaintiff (and other members of the class) poses, that is both central to the constitutional infirmity of the statute and the principal object of the injunction, the injunction is properly tailored to fit the nature and extent of the violation.

Finally, we note the narrowness of the basis on which we affirm the judgment of the district court and the injunction it contains. We hold only that the plaintiff and the members of the due process class are entitled to the opportunity to have a hearing consistent with due process principles to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry. We make no judgment as to what form that process should take. And we make none as to what the State may do once such a process is complete if, pursuant thereto, a particular offender is determined not to be currently dangerous or as to whether or to what extent the State may publicly disseminate information about such an offender.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the 19th day of October, two thousand and one.

BEFORE: Hon. Jose A. Cabranes,
Hon. Rosemary S. Pooler,
Hon. Robert D. Stack
Circuit Judges.

Docket Nos. 01-7561 (L); 01-7600 (XAP)

JOHN DOE, Individually and on behalf of others similarly situated,

Plaintiff-Appellee-Cross-Appellant,

SAMUEL POE, individually and on behalf of others similarly situated,

Plaintiff-Appellee,

V.

DEPT. PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, on behalf of Robert Bosco Director, JOHN ARMSTRONG, Comm.

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This case came on to be heard on the transcript of record from the United States Court for the District of Connecticut and was agued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk by

/s/ _____
Arthur M. Heller,
Administrative Attorney

ISSUED AS MANDATE:
Nov. 13, 2001

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

May 20, 2002

Richard Blumenthal, Esq.
Attorney General
55 Elm Street
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RE: 01-1231 – Connecticut Department of Public Safety v. Doe

Dear Mr. Blumenthal:

The Court today entered the following order in the above-entitled case:

"The petition for a writ of certiorari is granted."

The following items are enclosed: Memoranda describing the procedures under the Rules, a Specification Chart, the Guide to Counsel, Memorandum to Brief Printing Companies, and Counsel of Record Information Form. Although this case will not be scheduled for oral argument until the 2002 Term please note that requests for extensions of time to file briefs on the merits are not favored.

If you have any questions, please contact me.

Sincerely,

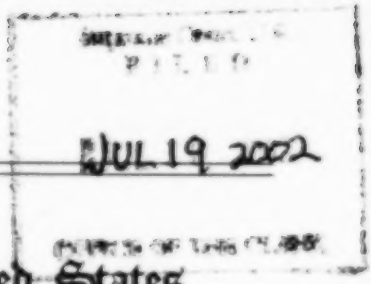
WILLIAM K. SUTER, CLERK

/s/

Denise J. McNerney
Merits Cases Clerk
(202) 479-3032

Enclosures

(7)



No. 01-1231

In The
Supreme Court Of The United States
October Term, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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No. 01-1231

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS WITH APPENDIX

QUESTION PRESENTED

This Court granted the petitioners' petition for a writ of certiorari on the following issue:

> Did the Court of Appeals erroneously conclude, contrary to other courts of appeals and in a manner inconsistent with the Court's ruling in *Paul v. Davis*, that Connecticut's Sex Offender Registration Law implicates an offender's liberty interest by listing offenders in an undifferentiated Registry, and violates due process by failing to afford the offender a hearing regarding his 'current

dangerousness' before publishing true and accurate information about him and his conviction history?

LIST OF PARTIES

In both the District and the Court of Appeals the plaintiffs are listed as Samuel Poe and John Doe.

In both courts below, the defendants were the Department of Public Safety on behalf of Henry C. Lee, Commissioner, the Office of Adult Probation on behalf of Robert Bosco, Director, and John Armstrong, Commissioner of the Department of Correction.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on October 19, 2001, is reported at *Doe v. Department of Public Safety*, 271 F.3d 38 (2d Cir. 2001), and is printed in the Joint Appendix ("JA") at JA 232-277. The memorandum of decision of the United States District Court for the District of Connecticut, Chatigny, *J.*, dated March 31, 2001, is reported at 132 F. Supp.2d 57 (D. Conn. 2001), and is printed in the Joint Appendix to this petition at JA 134-162.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes at issue appear in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on October 19, 2001. The petitioners filed their petition for certiorari on February 19, 2002, which this Court

granted on May 20, 2002. The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts

The respondent,[1/] John Doe, was convicted in Connecticut of a crime designated by Connecticut law as a "sexually violent offense," and released from his sentence sometime between 1988 and 1998. JA 116. He brought suit pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Connecticut's Sex Offender Registration Law ("SORL"), alleging violations of both the Due Process Clause of the Fourteenth Amendment and the Ex Post Facto Clause of the United States Constitution. JA 112-132. Specifically, and notwithstanding an explicit disclaimer to the contrary, the respondent alleged, with regard to his due process claim, that the SORL publicly "stigmatized" and defamed him by falsely proclaiming him as a "dangerous" sex offender. JA 113. This defamation, he claimed, combined with Connecticut's sex offender registration requirements, constituted a violation of his right to procedural due process. *Id.*

A. Federal Law

Like many other states, Connecticut's legislature enacted its SORL in part to continue to qualify Connecticut for federal funds pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("Wetterling Act"), 42 U.S.C. § 14071 (1994 & Supp. V. 1999).[2/] The Wetterling Act conditions the availability of certain federal funding

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1/ The caption of this case has at all three levels listed two pseudonyms as plaintiffs, but John Doe was and remains the sole named plaintiff and respondent-appellee.

2/ *See* Conn. Judiciary Committee pt. 4, p. 1069 (March 9, 1998) (remarks of T. Siconolfi, Director of Justice Planning for the Office of Policy & Management, testifying on behalf of Governor Rowland).

on a state's substantial compliance with the Act's standards for state sex offender registration and public information laws.[3/] 42 U.S.C. § 3756; 42 U.S.C. § 14071(e)(2) (Supp. V 1999). The Wetterling Act specifically modified previously existing federal law to require that a participating State not only collect registration information, but "release relevant information that is necessary to protect the public concerning a specific person required to register." 42 U.S.C. § 14071(e)(2).

Federal guidelines developed by the United States Attorney General pursuant to the Act's requirements provide that participating states "*must* establish a conforming information release program that applies to offenders required to register on the basis of convictions occurring after the establishment" of the federal registration laws. 64 Fed. Reg. 572 (1999) (emphasis added). The "principal objective of the information release programs will include means for members of the public to obtain information concerning registered offenders." 64 Fed. Reg. 572, 581 (1999).[4/]

Although federal law requires that states make Registry information available to the public, it leaves it to the states to determine how to do so. *Id.* Specifically, the federal guidelines contemplate two systems of information disclosure. A system like Connecticut's, in which conviction history is both the sole criteria

3/ The Department of Justice Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, provide: "[T]he Act's standards constitute a floor for state programs, not a ceiling. States do not have to go beyond the Act's minimum requirements to maintain eligibility for full Byrne Grant funding, but they retain the discretion to do so, and state programs do often contain elements that are not required under the Act's standards." 64 Fed. Reg. 572, 575 (1999).

4/ "[I]nformation collected under a state registration program may be disclosed for any purpose permitted under the laws of the state. Therefore, there is no requirements [sic] under the Act that registration information be treated as private or confidential to any greater extent than the state may wish." 64 Fed. Reg. 572, 581 (1999).

for inclusion in the Connecticut Sex Offender Registry ("Registry") and the primary information released from the Registry, is referred to as an "information on request" system. *Id.* The other system the federal guidelines contemplate involves a "risk assessment" process, providing registrants with a hearing at which state officials attempt to determine, in two or more categories, the level of risk a given individual poses to the community. *Id.* This assessment results in a tiered system whereby the level of public notification is determined by the sex offender's risk classification. *Id.*[5/]

B. Connecticut Law

Connecticut's current SORL, enacted in 1998 and amended in 1999, Conn. Gen. Stat. §§ 54-250 to 54-261; 54-102g, requires Connecticut's Department of Public Safety ("DPS") to maintain a central registry of persons residing in Connecticut who have been convicted of enumerated criminal offenses designated as "sexually violent offenses" and released into the community since 1988.[6/] Conn. Gen. Stat. §§ 54-250 to 54-252. Persons released after the effective date of the original act, October 1, 1998, who were convicted of enumerated offenses designated as "criminal offenses against a minor" must also register. Conn. Gen. Stat. § 54-251.[7/]

5/ Most recently, in 2000, Congress enacted the Campus Sex Crimes Prevention Act (CSCPS), Pub. L. No. 106-386, § 1601, 114 Stat. 1537, amending the Wetterling Act, 42 U.S.C. § 14071(j) and 20 U.S.C. § 1092(f)(1) (1994 & Supp. V. 1999). This Act, effective in October 2002, requires States participating in the Wetterling program to make available conviction information regarding all registered sex offenders either enrolled in or employed by an institution of higher education, without regard to the presence or result of any individualized risk assessment.

6/ Connecticut also requires the registration of persons found not guilty of enumerated offenses by reason of mental disease or defect. Conn. Gen. Stat. §§ 54-251(a); 54-252(a); 54-253(a), 54-254(a); 54-255(a), 54-256. The registration statutes treat convictions of enumerated sex offenses and such findings of not guilty identically, and therefore both are collectively referred to throughout this brief as "convictions".

7/ In 1999, Connecticut amended its new law to include a broader list of

Registrants are required to provide to the DPS their addresses, fingerprints, picture, and a blood sample, and are required to update their address periodically and their picture at least every five years. Conn. Gen. Stat. §§ 54-250 to 54-252; 54-102g. Registration requirements continue for ten years for all registrants except those convicted of offenses Connecticut law designates as "sexually violent offenses," who are required to maintain their registration for life. Conn. Gen. Stat. § 54-252(a).[8/]

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sex offenses resulting in registration. Conn. Gen. Stat. §§ 54-251(b), (c). This broader list of offenses includes Fourth Degree Sexual Assault. Connecticut also amended its law to provide a mechanism whereby limited categories of registrants could seek an exemption from the public dissemination of their Registry information, while maintaining their registration status. Fourth Degree sex offenders may also seek to be excused from the registration requirements, as may those second degree sex offenders whose victims were between the ages of 13 and 16, if the offender was no more than two years older than such person at the time of the offense. Conn. Gen. Stat. § 54-251(b). In addition, offenders in cohabiting relationships with victims whose identities might be revealed, and one-time offenders who did not serve a prison sentence may apply to have their information restricted to law enforcement use only. Conn. Gen. Stat. §§ 54-255(a), (b), (c).

8/ The Wetterling Act requires that states participating either designate certain convicted sex offenders as "sexually violent predators" or establish compliance with this portion of the Act through alternative measures. 42 U.S.C. § 14071(a)(2)(C). Although participating in and certified as in compliance with the Wetterling program, Connecticut does not designate any persons as "sexually violent predators," consistently avoiding any label other than the accurate term "convicted sex offender." The Wetterling Act allows "alternative measures of comparable or greater effectiveness in protecting the public" to constitute a waiver of the requirements related to sexually violent predators. 64 Fed. Reg. at 574. In addition to requiring that a state designate some persons as "sexually violent predators," the Act requires that those persons so designated report to the State any mental health treatment they have received. As Connecticut does not designate any persons as sexually violent predators, it requires those persons convicted of felonies designated as sexually violent offenses provide treatment information. Conn. Gen. Stat. § 54-252(a).

Those registrants failing to comply with registration requirements are subjected to arrest and prosecution for a Class D felony. Conn. Gen. Stat. §§ 54-252, 54-253, 54-254, 54-255. Each of the preceding requirements is mandated by or consistent with Connecticut's participation in the Wetterling program. 42 U.S.C. §§ 14071(a), 14071(b); 64 Fed. Reg. 572, *et seq*.

As of May 15, 2001, the Registry contained information regarding 2,075 individuals, with 1641 of those registrants in compliance with the law. JA 15. Naturally, the number of convicted offenders on the Registry continues to grow as more offenders are convicted of covered offenses, released from prison, or move into Connecticut.

Connecticut law requires that DPS make Registry information available to the public in two ways. First, DPS must post on an Internet website each registrant's photograph, conviction history, address and identifying marks or features. Conn. Gen. Stat. § 54-258. Prior to being enjoined, the website allowed visitors to access individual offender screens by conducting targeted searches: i.e., offender name or partial name, town or zip code.[9/] In addition, the SORL requires Connecticut law enforcement agencies to maintain Registry information about sex offenders residing in their jurisdictions, and to share that information upon request with members of the public. Connecticut's statute also specifically requires that a warning regarding criminal prosecution for misuse of registry information be provided any time Registry information is accessed, either on the Internet or by State or local police. Conn. Gen. Stat. § 54-258a.

9/ The Court of Appeals misunderstood the District Court record in noting: "During its first five months of operation, the website was visited more than three million times." *Doe v. Public Safety*, 271 F.3d at 44 n.14. The parties stipulated that *individual* sex offender listings on the website had been accessed approximately 3 million times (as that was the method of record keeping maintained by DPS). JA 16. A single visitor to the website could access the sites of any number of registrants at a time, or repeatedly, meaning that the actual number of visitors was significantly fewer than the figure reported by the Court of Appeals.

Visitors to the Sex Offender website would find the following language prominently displayed on the initial screen:

> **This information is made available for the purpose of complying with Conn. Gen. Stat. § 54-250 *et seq* . . . The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. *The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous.* Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual. Anyone who uses this information to injure, harass, or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.**

271 F.3d at 44-45 (emphasis added).

II. Proceedings Below

The District Court granted summary judgment for the respondent on his procedural due process claim, declaring SORL violated of the respondent's procedural due process rights. *Doe v. Lee*, 132 F. Supp.2d at 66 (D. Conn. 2001). The District Court then certified this matter as a class action with all Connecticut registrants as members of the class and enjoined all public access to Connecticut's Registry, on May 17, 2001. JA 186-87. The District Court granted summary judgment for the petitioners on the respondent's Ex Post Facto claim. *Doe v. Lee*, 132 F. Supp.2d at 70.

The basis of the District Court's due process holding was the "undifferentiated" nature of Connecticut's Registry. Specifically, the Court reasoned that the fact that all sex offenders were included together and identified as registrants, coupled with the availability of the Registry to the public, falsely implied that all persons contained in the Registry are dangerous and likely to re-offend. *Id.* at 63-65. The District Court decided that the explicit disclaimer to the contrary could not sufficiently overcome what it considered an implicit suggestion of dangerousness, stating: "Despite the accuracy of the registry data concerning the plaintiff and the statement on the website that no determination of any individual's dangerousness has been made, the registry *suggests* that the plaintiff is currently dangerous." *Id.* at 63. (emphasis added). On this basis, the District Court determined that the public availability of accurate data in Connecticut's Registry conveyed a false message, and therefore that the State of Connecticut had "stigmatized" or defamed the respondent as well as other "nondangerous registrants." *Id.* at 64.

The District Court applied a "stigma plus" test derived from this Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976), which requires a claim of constitutional defamation to include an additional element -- the loss or deprivation of a "right or status previously held under state law." *Id.* at 708; *see Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994). Having found the stigma portion satisfied, the District Court then held that the "plus" portion of the "stigma plus" test was satisfied because the respondent must register his identifying information and update his address or risk criminal prosecution. *Id.* at 64-66. The District Court reasoned that these registration requirements deprive the respondent of a previously existing legal status unencumbered by registration requirements, when taken together with the "stigmatizing" conduct of publishing accurate Registry information implicate a liberty interest. *Id.* at 66. Because Connecticut does not provide any hearing prior to release of Registry information on the question of a registrant's dangerousness, the District Court held that the release of this information violated the respondent's procedural due process rights. *Id.* The Court noted that the cure for this constitutional

infirmity would be for Connecticut to implement a tiered system: "In a tiered system, a recipient of a registrant's information can discern the dangerousness of that registrant relative to the universe of sex offenders." *Id.* at 64.[10/]

Having found what it considered a constitutional violation, the District Court enjoined any public access to the undifferentiated Registry information if such disclosure would identify the information as coming from the Registry. In particular, the Court enjoined the defendants from the following:

> 1) disclosure or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class if the information identifies the class member as being included in the Registry; and
>
> 2) identifying any member of the due process class as being included in the Registry.

JA 188. Under the District Court's injunction, the public can neither access the Internet website, nor obtain Registry information from a local law enforcement agency. The District Court did not enjoin the registration requirements, however, and therefore convicted sex offenders must continue to register and provide identifying information.

The Court of Appeals upheld the District Court's injunction and its determination that Connecticut's SORL violates the respondent's procedural due process rights. Noting that "stigma and defamation are virtually synonymous," *Doe v. Public Safety*, 271 F.3d at 48 n.16, the Court of Appeals concluded that Connecticut's Registry stigmatized and defamed the respondent notwithstanding its concession that nothing factually erroneous appeared in the Registry. In fact the Court noted that Connecticut's "assertions" that persons included on the Registry had been convicted of offenses designated by the state as sex offenses "are

10/ *See also Doe v. Lee*, 132 F. Supp.2d at 64. ("Because there is no classification system, the viewer has neither absolute nor relative information regarding the dangerousness of the registrant.").

concededly true." *Id.* at 47. The Court of Appeals went further to state: "We share some of the State's doubt as to whether, as a matter of law, public dissemination of the Registry implies to any particular reader, its average reader, or to 'an appreciable fraction' of its readership, that every listed person . . . is currently dangerous." *Doe v. Public Safety*, 271 F.3d at 49, citing *Peck v. Tribune Co.*, 214 U.S. 185, 190 (1909) (defamation action).

Conceding the "highly paternalistic" nature of any court order "the purpose of which was to require [a State] to keep truths from its citizens," *Id.* at 50, *citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 770 (1976), the Court of Appeals nonetheless accepted the District Court's determination that the "message that *some* registrants are currently dangerous is, and is intended to be, communicated to viewers of the Registry." *Doe v. Public Safety*, 271 F.3d at 49, *citing Doe v. Lee*, 132 F. Supp.2d at 64 (emphasis in original). From this premise, the Court of Appeals leapt to the conclusion that *all* registrants included on the Registry were defamed by the Registry's implication of dangerousness, and that the first prong of the stigma test was satisfied.

As for the "plus" prong, the Court of Appeals stated: "[W]e hold that a plaintiff establishes a 'plus' factor for purposes of the *Paul v. Davis* 'stigma plus' test only if he or she points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit." *Id.* at 56. The Court of Appeals minimized the substance of the "plus" requirement, stating:

> The [Supreme] Court did *not* suggest that the requisite tangible interest or burden *needs to meet some threshold of substantiality* or that it must implicate a certain kind of interest, but rather that it must at least entail some *non-trivial* state involvement that removes the plaintiff's complaint from the realm of traditional state-law defamation.

Id. at 54-55 (emphasis added).

Thus, the Court of Appeals derived from *Paul v. Davis* a new, diminished standard for the existence of a plus: that the governmental action or involvement complained of be something unique to a governmental actor, or "quintessentially 'governmental in nature.'" *Id.* at 57. As only a governmental entity can compel registration, the Court of Appeals concluded that the registration requirements of Connecticut's law constituted a sufficient "plus" that, when combined with the implicit defamation, creating a liberty interest. *Id.*

SUMMARY OF THE ARGUMENT

> Sex offenders are a serious threat in this Nation. In 1995, an estimated 355,000 rapes and sex assaults occurred nationwide. Between 1980 and 1994, the population of imprisoned sex offenders increased at a faster rate than for any other category of violent crime. . . . [T]he victims of sex assaults are most often juveniles. In 1995, for instance, a majority of reported forcible sex offenses were committed against persons under 18 years of age. Nearly 4 in 10 imprisoned violent sex offenders said their victims were 12 or younger. When convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault.

McKune v. Lile, 536 U.S. __, 122 S.Ct. 2017, 2002 U.S. LEXIS 4206 at *18 (2002) (citations, quotations omitted).

In response to the special problems posed by sex offenders, the federal government and all 50 states have enacted a variety of laws designed to promote an increased awareness of their presence in our communities. Department of Justice, Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999) at 1 ("CSOM, *Registration*"). A critical part of such legislation has been the enactment of Sex Offender Registration Laws, or "Megan's Laws," referring to Megan Kanka, a 7-year old raped and murdered by her neighbor. Neighborhood residents were unaware that Megan's killer had been twice convicted of sex offenses. *E.B. v. Verniero*, 119 F.3d 1077, 1097 n.17 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109, 1110 (1998).

Connecticut's SORL requires the State's DPS to collect and maintain objective, truthful information about persons convicted of sex offenses, including their identity, statutory offenses, picture and address, and to make that information available to the public on request, both via the Internet and at local law enforcement sites. The DPS complied with this law and compiled the Sex Offender Registry. The Court of Appeals held that making this information available to the public is constitutionally impermissible under the Due Process Clause of the Fourteenth Amendment.

This Court has made clear that no liberty interest exists sufficient to implicate due process in an action alleging defamation by a government defendant absent both a defamatory statement and concomitant loss of a tangible right or status previously recognized by state law. Neither a defamatory statement nor the loss of a tangible right exists in the facts of this case. The decision of the Court of Appeals prohibits the State from communicating to its citizens truthful and important information about sex offenders. This unwarranted interference with the State's ability to disseminate this information is wholly at odds with basic constitutional principles that protect and promote the open flow and exchange of truthful communication. Moreover, this attack on the State's right to inform the public is premised on the misapplication of novel theories of implied defamatory statements and expansively strained notions of what constitutes an impairment of a right or status under state law.

Indeed, the flaws in the Court of Appeals' analysis are many. First, the petitioners have not defamed or falsely stigmatized convicted sex offenders by making the State's Registry accessible to the public. The information conveyed is accurate and true, and any impression of "dangerousness" is more than adequately disclaimed. Even conceding for the sake of argument the Court of Appeals' conclusion that an implication or suggestion is communicated that *some* members of the group of convicted sex

offenders may be dangerous, no defamation exists. As no specific subject of the alleged statement regarding dangerousness is identified, the respondent's claims of defamation must fail. This Court should reject the respondent's due process claim, lest public officials be subjected to constitutional liability for behavior that under tort law private entities would not be liable.

Not only does the respondent's claim of defamation fail, but the additional element necessary to a liberty interest, referred to by the lower courts as the "plus," cannot be satisfied by the requirement that convicted sex offenders register their name and other identifying factors with the State. The registration requirements do not materially alter a status or right previously recognized by state law.

Furthermore, *Paul v. Davis* requires that the additional or "plus" element be causally related to the stigmatizing statement. This causal relationship is entirely lacking here as the registration requirements exist independently of the purported defamatory statement. In fact, those requirements continue in place even under the injunction prohibiting the dissemination of the Registry information. The Court of Appeals' decision accepting the registration requirements as satisfying the "plus" element effectively eviscerates the limits on constitutional torts imposed by this Court in *Paul v. Davis* and this Court should therefore reverse.

ARGUMENT

With regard to civil rights actions premised upon alleged governmental defamation, this Court has held that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul,* 424 U.S. at 701. "Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). Under *Paul v. Davis*, which both the respondent and the lower courts relied upon, a plaintiff must establish two things to make out a procedural due process claim based upon defamation. First, the plaintiff must establish that a governmental actor has subjected him to behavior

tantamount to the common-law tort of defamation. *Siegert,* 500 U.S. 226, 233 (1991); *Paul*, 424 U.S. at 697-712; *Roth*, 408 U.S at 573; *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Second, the plaintiff must demonstrate "that the governmental action taken in [the course of the defamation] deprived the individual of a right previously held under state law." *Paul*, 424 U.S. at 708. Lower courts, including the Court of Appeals in this case, have typically referred to this two-pronged analysis as the "stigma plus" or "defamation plus" test.[11/] *See id.* at 709 (referring to the stigma resulting from the defamatory character of the communication).

In this case, as in *Paul*, no liberty interest is implicated because the respondent cannot sufficiently establish either the first or second prong of the "stigma plus" test. Connecticut's SORL neither defames the respondent nor does it deprive him of a previously existing right or status.

I. Publication Of Truthful Information About Those Included In The Connecticut Sex Offender Registry Is Not Stigmatizing.

More than "mere defamation" is necessary to implicate a liberty interest. *Paul,* 424 U.S. at 706. *A fortiori*, a claim that does not suffice even to state a cause of action for defamation renders unnecessary further consideration of whether a liberty interest is implicated. For example, in *Board of Regents v. Roth*, this Court concluded that in the absence of a defamatory statement, no process was due a plaintiff who had not been rehired by a state defendant. *Roth*, 408 U.S. at 573. The Court stated:

11/ *See, e.g., Doe v. Public Safety,* 271 F.3d at 47; *Abramson v. Pataki,* 278 F.3d 93, 101 (2d Cir. 2002); *Aponte v. Calderon*, 284 F.3d 184, 195-97 (1st Cir. 2002); *Atwell v. Lisle Park District,* 286 F.3d 987, 992-93 (7th Cir. 2002); *Canon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001); *Cutshall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 376 (9th Cir. 1999).

> The State, in declining to rehire respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract, on a charge, for example, that he had been guilty of dishonesty, or immorality. *Had it done so, this would be a different case.* . . . In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Roth, 408 U.S. at 573 (emphasis added).

Similarly, in *Codd v. Velger*, 429 U.S. 624, 627 (1977), the lack of even an allegation that the statement at issue "was substantially false," an element of any defamation claim, doomed the plaintiff's defamation-based civil rights claim, resulting in a *per curiam* reversal of the Court of Appeals. *See also id.* at 636 (Stevens, *J.*, dissenting) ("[I]f he claims that the discharge deprived him of liberty, he does have the burden of proving that he was stigmatized."). Thus, the lack of an essential element of the underlying tort of defamation is fatal to this due process claim.

The respondent's claim that Connecticut's SORL stigmatizes him as "currently dangerous" fails to establish a defamation claim in two ways. First, the supposed "false suggestion" of dangerousness does not suffice as a matter of law to give rise to a false stigma, and therefore is not actionable as a constitutional claim. Second, given the inclusion of over 2000 convicted sex offenders on the Registry, the implication of dangerousness cannot be considered "of and concerning" any particular registrant or registrants.

A. The Dissemination Of Truthful Information About Sex Offenders Does Not Stigmatize The Respondent.

To make out a defamation claim and thereby invoke the protections of the due process clause, a plaintiff must demonstrate that the statement that he alleges to be defamatory is "substantially

false." *Codd*, 429 U.S. 624, 627 (1977); *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).[12/] The respondent's defamation claim in this case fails as a matter of law primarily because the Registry communicates no "substantially false" statement. The Court of Appeals' determination that the publication of "concededly true" conviction information in Connecticut's Registry somehow gives rise to a false implication stretches the bounds of logic and defamation law beyond the breaking point. *Doe v. Public Safety*, 271 F.3d at 47. Moreover, by enjoining the publication of accurate conviction information absent the addition of potentially inaccurate information, the lower court's holding runs contrary to principles of an open society and our federal system of government.

1. The Truthful Conviction Information In The Registry Does Not Imply A False Statement Of Current Dangerousness.

The Court of Appeals noted particularly that all of the information *explicitly* imparted by the DPS about the registrants -- "that they are persons convicted of crimes characterized by the State as sexual offenses"-- is "concededly true." *Id.* To arrive at a conclusion of falsity, therefore, the Court of Appeals, like the District Court, resorted to the doctrine of defamation by implication, a doctrine previously unrecognized in constitutional defamation law.[13/]

12/ The Courts of Appeals have uniformly required that to give rise to a due process claim the alleged defamatory statement must be false or sufficiently challenged as false. *See Abramson v. Pataki*, 278 F.3d at 101-102 (2d Cir. 2002); *Canon v. West Palm Beach*, 250 F.3d at 1301; *Llamas v. Butte Community College Dist.*, 238 F.3d 1123, 1129 (9th Cir. 2001); *Ersek v. Springfield*, 102 F.3d at 83-84 (3d Cir. 1996); *Vander Zee v. Reno*, 73 F.3d 1365, 1369 (5th Cir. 1996).

13/ Defamation, typically a common-law tort under state law, takes on constitutional dimensions in two circumstances: (a) due process claims under *Paul v. Davis*, and (2) first amendment limitations under *New York Times v. Sullivan* and its progeny. The purported implied communication in this case -- that all registrants are dangerous -- is not one that would be

The Court of Appeals correctly noted that the District Court "was not entirely clear . . . as to how public dissemination of the registry falsely stigmatizes the plaintiff." *Id.* at 48.[14/] Rather, the Court of Appeals found two "possible explanations" in the District Court's reasoning: "[1] that the registry *implies* that every person listed therein is in fact dangerous; and [2] that it *implies* that some of the registrants are dangerous and that each individual registrant is more likely than the average person to be currently dangerous." *Id.* (emphasis added).

Reasoning that the disclaimer on the website was at least effective enough to convey that the Registry includes "*both* dangerous and non-dangerous offenders," the Court of Appeals rejected the District Court's first possible explanation: that "visitors to the website necessarily understood it to say or imply that *all* of the registrants are in fact currently dangerous." *Id.* at 49 (emphasis added). The Court of Appeals accepted, however, the conclusion that the Registry necessarily communicated "the message that *some* registrants are currently dangerous." *Id.* (quoting *Doe v. Lee*, 132 F. Supp.2d at 64 (emphasis in original)). Then, standing logic on its head, the Court stated: "Even the disclaimer itself, by asserting that

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recognized as defamatory by even the most generous of state court common defamation standards. Those standards, therefore, are highly instructive in establishing the contours of a liberty interest protected by the due process clause. This Court has certainly never recognized the availability of an implication-based defamation claim against a governmental defendant, let alone established the elements of such a claim. Such a claim based on the dissemination of truthful information by a government to its citizenry is, to say the least, a novel one in this Court.

14/ Not only was the District Court "less than clear" on the stigma issue, it essentially admitted that no defamation had occurred:

> A person viewing any one registrant's information is told that the State has not assessed the registrant's risk of reoffense and has not determined whether he is currently dangerous. *While it is true, then, that the viewer has no reason to think the registrant is one of those who is dangerous*, the viewer also has no reason to think the registrant is not dangerous.

Doe v. Lee, 132 F. Supp.2d at 64 (emphasis added).

the DPS 'has made no determination that any individual included in the Registry is currently dangerous' clearly implies that some [individuals] *may* be." *Doe v. Public Safety*, 271 F.3d at 49 (emphasis added). Building one implication on another, the Court of Appeals reasoned that "it follows that publication of the registry *implies* that each person listed is *more likely than the average person* to be currently dangerous." *Id.* (emphasis added). "This implication stigmatizes *every person* listed on the registry." *Id.* (emphasis added). Finally, the Court of Appeals concluded: "Publication of the registry in its present form *implies* that persons listed on the registry are particularly likely to be currently dangerous." *Id.* at 50 (emphasis added).

The fallacy of the Court of Appeals' conclusion is self-evident. As a factual matter, the supposed and implicit "false" communication -- that a convicted offender is currently considered dangerous -- is expressly disclaimed. In fact, the *only* explicit statement addressed to the issue of "dangerousness" is the statement that no consideration or assessment of an offender's dangerousness has been undertaken or is intended to be communicated.

More fundamentally, as a legal matter, the Court of Appeals' "defamation by implication" theory does not hold up, depriving the respondent of the very foundation of his due process claim. Very simply, no precedent exists for the proposition that constitutional defamation can lie when the false or defamatory meaning allegedly implied by the communication of concededly true facts is explicitly disclaimed.

Although no consensus has emerged in the courts on the existence or the standard for the doctrine of "defamation by implication," the District of Columbia Circuit Court of Appeals has enunciated a test that is "rapidly becoming a standard for those jurisdictions that recognize implication claims." B. Sanford, *Libel and Privacy*, § 6.6, at 240.11 (2d ed. 1987).

> [I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication,

> by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends or endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning.

White v. Fraternal Order of Police, 909 F.2d 512, 520 (D.C. Cir. 1990) (emphasis added); *accord, Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1064-65 (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1997).

Neither the Court of Appeals nor the respondent point to any "undisclosed facts" that would eliminate any purported implication of dangerousness were such facts simultaneously communicated with registrants' conviction information. Is there any legitimate modification to the website in the form of more or less information that would make it less likely, to the respondent's mind, to convey a false impression? If there is not, then the claim of defamation by implication must fail, for only truthful information without omission or innuendo is being conveyed regarding any individual registrant or as to all registrants collectively.[15/]

15/ The respondent does not contend that state officials could not make a statement with regard to a *single* sex offender -- that he had been convicted of a sex offense and could be found living at a certain address. Presumably, some recipients of that statement would, on their own, conclude that the offender is dangerous based merely on the fact of the crime, rather than the means or method of publication. The Court of Appeals, however, concluded that by collecting accurate statements regarding all convicted sex offenders, the State conveys the "false implication" that all registrants are particularly likely to be dangerous. If this is true, then a statement conveying accurate conviction information about two or more convicted felons will always defame both or all of them, falsely implying that they are dangerous by including them together notwithstanding the information as to each is truthful. Under this reasoning, statements regarding the conviction history of more than one offender (or some minimal number of offenders) can never be made by any entity, public or private, without an actionable false implication being made at the same time.

In fact, DPS explicitly dispelled any such potentially false impression that the respondent or any given individual is considered dangerous.[16/] It would be paradoxical to say the least to conclude that the disclaimer is the cause of the alleged stigma. The disclaimer is not obtuse, confusing or unclear. It is direct and explicit enough to overcome any speculative misunderstanding about the intent of the public access to the Registry that the respondent attributes to the hobgoblin of innuendo or implication. Thus, the disclaimer fatally undercuts the respondent's stigma claim; it certainly does not support it. Rather, the most that might be said is that some viewers of the information might subjectively conclude that anyone convicted of a sexual offense may be dangerous, regardless of what appears on the Registry. This "inference," even if it "can be reasonably drawn," does not suffice to establish defamation in this context.[17/] *White,* 909 F.2d at 520.

Perhaps because recognizing actions for defamation by implication can work to limit free access to truthful information, courts that have recognized defamation by implication often impose limitations on the doctrine. B. Sanford, *Libel and Privacy*, § 6.6, at 240.11 (2d ed. 1987 & 1997 Supp.); R. Sack, *Sack On Defamation* § 2.4.5, at 2-30 (3d ed. 2002). In fact, Connecticut's Supreme Court has declined to recognize such a cause of action when the plaintiff could point to no additional "undisclosed facts" that would,

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16/ The respondent blames other attributes of the Registry, in addition to simple conviction information, for implying that all offenders listed thereon are dangerous, such as the fact that current addresses and pictures are included, thus giving the impression that current information is necessary due to the offenders' current "dangerousness." This is a specious argument. Address information provides a context for the information on the website and serves to limit interest in that information by limiting the universe of persons seeking out information as to individual registrants by precluding persons not in proximity to the offender.

17/ Nor is it at all certain that the inference *will* be drawn, or drawn uniformly. Different people will respond in different ways to accurate information regarding criminal convictions.

if included, have diminished any false implication. *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 322-23, 477 A.2d 1005 (1984). Other courts have similarly required private plaintiffs to point to "a specific material omission[] which, if published, would have rendered" the statement nondefamatory. *See, e.g., Locricchio v. Evening News Ass'n*, 438 Mich. 84, 476 N.W.2d 112 (1991), *cert. denied*, 503 U.S. 907 (1992); *Toney v. WCCO*, 85 F.3d 383, 392 (8th Cir. 1996). Neither the Court of Appeals nor the respondent has pointed to any additional, accurate information that, if disclosed, would have prevented an inference of dangerousness.

The respondent's goal of secreting Registry information from public access not only lacks any constitutional validity under the due process clause, it runs contrary to constitutional precepts, embodied in the First Amendment, which ensure "that debate on public issues should be uninhibited, robust and wide-open," *Sullivan*, 376 U.S. at 270, and demand the elimination of judicial barriers to truthful speech. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 767-77 (1986). Courts must remain always vigilant against obstructing the conveyance of truthful information to the public. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 2426 (2001); *Bartnicki v. Vopper*, 532 U.S. 514, 121 S.Ct. 1753, 1761 (2001); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). Specifically, the Court concluded that when the delineation between truthful and untruthful communications is uncertain, constitutional principles "require us to tip [the scales] in favor of protecting true speech." *Hepps*, 475 U.S. at 776. This is particularly appropriate when the truthful information imparted is a matter of public concern. *Florida Star v. D.J.F.*, 491 U.S. 524, 536 (1989). After all, "[t]ruth may not be the subject of either civil or criminal sanctions where discretion of public affairs is concerned." *Garrison*, 379 U.S. at 74.

In particular, this Court in *Paul* itself rejected an argument that the Constitution prevents a state from "publicizing a record of an official act such as an arrest." *Paul*, 424 U.S. at 713.[18/] Here,

18/ In orally explaining its injunction Order, the District Court made clear how little value it placed on the public's right to access and use this information. The Court ruled that the onus is entirely on law enforcement,

with the dissemination of concededly truthful information of unquestionable concern and interest to the public on the one hand, and at worst a possible inference of dangerousness on the other, the constitutional principle of preserving truthful speech demands that the latter be rejected.

Naturally, any time there is a truthful communication regarding an individual's criminal conviction history, some persons may form a negative impression based on that information. However, this negative impression arises not because of the communication, but because of the underlying conviction. Criminal convictions of all kinds remain of interest to the public, are available to the public in record form and may be reported on by the press, resulting in the "beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975); *see also id.* at 493, 495-96. Given the public's right to access and make available criminal conviction information, *see Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984), and the state's obligation to do so, the *accurate* reporting of criminal conviction information cannot be considered defamatory.[19/] This impression arises, not from the State's

as opposed to the public, to attempt to prevent sex assaults; the public can have no opportunity to provide itself with accurate, undifferentiated information to take any precaution, however slight, on the basis of that accurate information. Rather, the District Court stated, "If . . . the order might imperil school children . . . then I would urge the Attorney General to *tell the people involved in law enforcement* to be more alert." JA 198. (emphasis added).

19/ The State of New York, for example, provides a statutory privilege in libel actions for any "fair and true report of any judicial proceeding." NY CLS Civ. R. § 74 (2002). Indeed, one suit arising out of Connecticut which challenged as defamatory statements by the media regarding the plaintiff's criminal convictions was held dismissable as frivolous pursuant to 28 U.S.C. § 1915(a). *Urbano v. Sondern*, 41 F.R.D. 355 (D. Conn.) (Zampano, *J.*), *aff'd*, 370 F.2d 13 (2d Cir. 1966), *cert. denied*, 386 U.S. 1034 (1967). Likewise, defamation actions challenging accurate reports of criminal convictions are often considered deficient for lack of actual damages. *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1975).

publication of the Registry of convicted sex offenders, but from those offenders' own criminal conduct.

Neither the respondent nor the Court of Appeals offered any justification for creating a different defamation standard for a governmental defendant than a private one in the context of disclosing accurate conviction information.[20/] In fact, *Paul v. Davis* specifically cautioned against construing the due process clause expansively to allow all common law torts that could be brought against a private defendant to give rise to constitutional causes of action when brought against governmental actors. *Paul*, 424 U.S. at 702. Certainly, the lower courts provide no justification for creating constitutional liability for communications that a private entity could make with impunity.

2. The Due Process Clause Does Not Mandate The Dissemination Of Potentially Inaccurate Predictions Of Future Behavior.

Ironically, the lower courts in this case held that the State could only constitutionally disseminate the truthful conviction information already compiled in the Registry by including *additional*, highly subjective and potentially unreliable information: namely, the State must hold a hearing to assess or predict, an already convicted offender's dangerousness.[21/] In addition to being counter-intuitive, this approach deprives states of the discretion to make their own choices about the appropriateness of such "risk assessments," discretion that Congress has specifically afforded states under the Wetterling Act. Instead, a state must undertake an

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20/ There is certainly no federal common law recognizing defamation by implication claims against governmental defendants.

21/ *See, e.g., E.B. v. Verniero*, 119 F.3d 1077, 1083-84 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109, 1110 (1998) (Describing three-tiered system of sex offender classification in New Jersey); *Doe v. Pataki*, 3 F. Supp.2d 456, 471-72 (S.D.N.Y. 1998) (Describing three-tiered system of sex offender classification in New York).

imprecise and controversial "risk assessment" process with all its faults, or permit no publication of this truthful data at all.

Predictions about future dangerousness, expert or otherwise, are at best largely problematic and at worst wholly unreliable. "The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific." *Flores v. Johnson*, 210 F.3d 456, 463 (5th Cir.) (Garza, *J.*, concurring) (rejecting psychiatrist's testimony regarding "future dangerousness" pursuant to requirements set by this Court for expert testimony.), *cert. denied*, 531 U.S. 987 (2000). Indeed, The American Psychiatric Association has informed this Court that a psychiatrist's prediction of "future dangerousness," is not "always wrong with respect to future dangerousness, only most of the time." *Barefoot v. Estelle*, 463 U.S. 880, 900 (1983). This Court has, very recently, recognized the inherent difficulty in predicting future behavior. *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 870 (2002).[22/] Connecticut's Supreme Court has likewise noted that "psychiatric predictions of future dangerousness are tentative at best and are frequently conceded, even within the profession, to be unreliable." *State v. Putnocki*, 200 Conn. 208, 219-20, 510 A.2d 1329, 1335 (1986) (citations omitted).

Given the inherent difficulty in predicting future dangerousness, Connecticut's legislature, like legislatures in 18 other states,[23/] has declined to include a risk assessment of sex offenders as part of their public notification. These states choose to

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22/ This is not to suggest that a prediction of future behavior is beyond the realm of judicial (or agency) endeavor. But the limits of such an endeavor are undeniable. The "evidence is overwhelming" that "the unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." *Barefoot*, 463 U.S. at 920 (Blackman, *J.*, dissenting) (internal quotes, citations omitted).

23/ Center for Sex Offender Management, *Sex Offender Registration: Policy Overview & Comprehensive Practices* at 6 (Oct. 1999))available at www.csom.org/pubs/sexreg.html).

avoid the risk of providing inaccurate assessments of dangerousness, in favor of providing to the public only information whose accuracy can be verified.[24/] The choice not to undertake a prediction of future dangerousness is specifically permitted by the Wetterling Act, and moreover reflects the State's own policy determination that a risk assessment system is neither the best use of its resources, nor the best way for it to comply with the Wetterling Act's requirement that accurate information regarding convicted sex offenders be made available to the public.

This Court has emphasized the "societal costs" inherent in forcing policy choices upon states based on judicial determinations of the requirements of due process "rather than from the normal processes of community debate and legislative action." *Ingraham v. Wright*, 430 U.S. 651, 681 (1977). Fundamental notions of federalism demand respect for the policy judgments of state legislatures. *Lewis v. Casey*, 518 U.S. 343, 385 (1996); *Missouri v. Jenkins*, 515 U.S. 70, 131-33 (1995). Although some states might choose to undertake risk assessments, the Fourteenth Amendment's due process clause does not require that choice. Indeed, for most lay people and experts, the most accurate predictor of future risk (as distinguished from "dangerousness") is the fact of a previous conviction or convictions. *See* U.S. Sentencing Commission, *Report to the Congress: Sex Offenses Against Children*, at 34 (June 1996) ("The most consistent finding is that criminal history, especially a history of sex offenses, is the most important and accurate predictor of future sex offending.").

24/ This legislative policy choice is similarly reflected in the clear and explicit disclaimer on the website that Connecticut's sole criteria for inclusion in the Registry is an offender's conviction history.

B. An Implied Statement Regarding A Group Is Insufficient To Establish Defamation As To One Member Of A Group Numbering Over 2000.

The purported "implicit" defamatory statement, relied upon by the lower courts in this case, is deficient in another regard. Black-letter defamation law requires that an alleged defamatory statement must be "of and concerning" a plaintiff in order to be actionable. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964); *Rosenblatt v. Baer*, 383 U.S. 75, 79-82 (1966). When allegedly defamatory statements are made about a group, an individual must be individually defamed for that individual to have a valid defamation claim. *Sullivan*, 376 U.S. at 289. A defamatory statement concerning a group is actionable, according to the *Restatement (Second) of Torts*, "*only if*":

> (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or
>
> (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.

Restatement (Second) of Torts, § 564a (1977) (emphasis added).

Under this so-called group defamation doctrine, *Arcand v. The Evening Call Publishing Co.*, 567 F.2d 1163, 1163 (1st Cir. 1977), a plaintiff must establish some reasonable personal application of the alleged defamatory communication to himself. When the group is so large that there is no likelihood that a [recipient] would understand the [communication] to refer to any particular member of the group, "it does not defame any individual." R. Sack, *Sack on Defamation*, § 2.9.4, at 2-126 (3rd Ed. 2002). "That reasonable persons may or in fact do understand that the plaintiff is being referred to individually becomes irrelevant when the group is too large." *Id.* Moreover, there is a "recognition

that freedom of expression [is] inconsistent with the ability of large groups of people to maintain [defamation] actions." *Id.* at 2-132.

"[I]t is not possible to set definite limits as to the size of the group or class, but the cases in which recovery [for defamation by any individual member of the group] has been allowed usually have involved numbers of 25 or fewer." *Restatement (Second) of Torts*, § 564a, comment b. Groups made up of as many as 161 individuals have been held to be too large for any member of the group to be defamed by a statement concerning all of them. *Restatement (Second) of Torts*, § 564a, illust. 2. The reason for this is obvious: as the size of any group increases, "it becomes more and more difficult for one to show that he was the one at whom the statement was directed." *Kentucky Fried Chicken of Bowling Green v. Sanders*, 563 S.W.2d 8, 9 (Ky. 1978) (per curiam).

In this case, the group consists of literally thousands of individuals.[25/] The Court of Appeals itself concluded that any statement concerning "dangerousness" that can be implied by the Registry is only reasonably attributable to "some" members of the group, and is certainly not attributable to any specific member of the group. *Doe v. Public Safety*, 271 F.3d at 49. Indeed, this is precisely the Court of Appeals' criticism of the Registry: that it is undifferentiated as to the group members. Given the size of the Registry and the nature of the alleged implicit statement, no cause of action for defamation can arise, and the respondent's due process claim must fail.

Abramson v. Pataki, 278 F.3d 93, 101 (2d Cir. 2002), a due process decision issued by the same Court of Appeals, held that a defamatory statement about a group much smaller than Connecticut's Registry group could not constitute defamation even when the statement specifically referred to a majority of the group. *Id.* In *Abramson*, a union consisting of 191 members claimed the deprivation of a liberty interest when the members were not hired or rehired, and alleged a defamatory statement, namely: "[A]t any given time on our floor we have estimated that over 65 percent of

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25/ As of May 15, 2001, 2,075 individuals were part of the Registry, with 1641of those registrants in compliance with the law. JA 172.

the personnel on the floor were either convicted felons or associated with organized crime." *Id.* at 97-102. The Court of Appeals, relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), held that the challenged statement, even if false and defamatory, was insufficient due to the lack of a specific statement with respect to any one union member. "[A]n individual plaintiff must be clearly identifiable to support a claim for defamation." *Id.* at 102. Thus, the union's due process claim was flawed. *Id.* at 102-103.

Curiously, the inescapable force of its own later holding in *Abramson* eluded the Court of Appeals in the present case when it held that the "message that *some* registrants are currently dangerous is, and is intended to be communicated," *Doe v. Public Safety*, 271 F.3d at 49, and that "[p]ublication of the Registry in its present form implies that persons listed on the Registry are particularly likely to be currently dangerous. Unless everyone on the Registry is particularly likely to be dangerous . . . that implication is not true." *Id.* at 50.

Certainly, the Registry identifies each registrant personally as a convicted felon. But the individual statements on the Registry regarding each identifiable convicted registrant are true. The implication the Court of Appeals found to be false, that some registrants are dangerous, is not directed at any particular registrant, but at most to the group of registrants as a whole.

While the Court of Appeals found an implicit statement about the group of Connecticut registrants as a whole, this implicit statement -- that *some* registrants are dangerous and that all registrants are more likely to be dangerous than non-registrants -- is simply not sufficient. Even if the implicit statement of dangerousness is "defamatory of [registrants] as a group, . . . no individual [registrant] has a cause of action for libel." *Fowler v. Curtis Publishing Co.*, 182 F.2d 377, 378 (D.C. Cir. 1950).

Applying the group defamation doctrine to reject claims like the respondent's would comport with this Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). There, the Court held that states are not prevented under the due process clause from establishing general, irrebuttable classifications of persons, even

where those classifications might be erroneous as to some members of the class. *Id.* at 119-20. Allowing states to make such classifications without risk of incurring liability to individual class members preserves the states' autonomy in legislatively addressing pressing public concerns. It is certainly nonsensical in light of *Paul* for states to be liable under standards lower than those applied to private defendants and for conduct that involves the dissemination of truthful information.

II. The Respondent Cannot Establish That SORL's Public Access Provisions Deprived Him Of A Right Or Status Previously Recognized By State Law As Required By *Paul v. Davis*.

In *Paul v. Davis*, this Court clarified that an "interest in reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *See Paul*, 424 U.S. at 712. "Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert v. Gilley*, 500 U.S. 226, 234 (1991). Consequently, defamation of an individual by a government actor does not, without more, implicate the procedural guarantees of the Due Process Clause of the Fifth or Fourteenth Amendments. *Paul*, 424 U.S. at 702. Thus, in order to preserve important federalism-based restrictions on the scope of the Fourteenth Amendment, the *Paul* Court held that it is insufficient merely to allege and prove the elements of defamation to prevail against a government defendant on a due process claim. Nor does it suffice to allege impairment of future employment opportunities, out-of-pocket losses, or other forms of damages that normally flow from defamatory conduct. *See Siegert*, 500 U.S. at 234. Rather, the Court held that to succeed on a defamation-based due process claim, a plaintiff must allege that "*as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished.*" *Paul*, 424 U.S. at 711 (emphasis added).[26/]

26/ Although this Court has not itself specifically adopted "stigma plus" as shorthand for the test it articulated in *Paul*, courts typically refer to this additional requirement as the "plus" component of the "stigma plus" test.

In holding that the respondent had sufficiently demonstrated harm beyond mere defamation (i.e., "stigma-plus"), the opinion of the Court of Appeals contravenes *Paul* in several key respects. First, the Court of Appeals' formulation of what may constitute adequate "plus" factors significantly and erroneously expands this Court's narrow and limited ruling in *Paul*. Second, the Court of Appeals ignored this Court's requirement that the asserted plus factors be caused by, and not merely temporally related to, the allegedly defamatory governmental conduct. Finally, the plus factors the Court of Appeals relied upon are simply inadequate under *Paul* to make out a due process claim.

A. The Court Of Appeals' Expansive Misapplication Of The "Plus" Requirement Threatens *Paul's* Limiting Principles.

Paul's requirement that a plaintiff allege and prove an alteration or extinguishment of a right or status previously recognized by state law was grounded on a purposefully circumscribed conception of the Fourteenth Amendment's due process clause that enforces important considerations of federalism. In particular, the *Paul* Court sought to avoid the "constitutional shoals" that would result from an application of the due process clause rendering the Fourteenth Amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul*, 424 U.S. at 701. The Court noted: "it is hard to perceive any logical stopping place" if due process protection is extended to interests traditionally protected by state tort law, an extension that "would come as a great surprise to those who drafted and shepherded the adoption of the [Fourteenth] Amendment[.]" *Id.* at 698.[27/]

See Siegert, 500 U.S. at 234 ("Siegert in this Court asserts that this assumption was correct -- that if the defendant acted with malice in defaming him, what he describes as the "stigma plus" test of *Paul v. Davis* is met.").

27/ The general principle of *Paul* -- that overlap between traditional tort

Thus, limiting defamation claims by requiring an adequate showing of harm in addition to stigma flows logically and constitutionally from the larger principle that not "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establish[es] a violation of the Fourteenth Amendment." This principle itself flows from federalism principles. *Id.* at 693; *City of Boerne v. Flores*, 521 U.S. 507, 520-524 (1997) (discussing history of Fourteenth Amendment, and particularly the premium framers placed on avoidance of intrusion by federal

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law causes of action and procedural due process claims brought pursuant to 42 U.S.C. § 1983 should be avoided -- applies without regard to whether, in a particular case or a particular jurisdiction, the plaintiff would actually have redress under tort law, unimpeded by common law, constitutional or statutory immunities. Indeed, in *Paul*, the Court did not address whether immunities or other impediments existed under Kansas law or some other source that would have prevented the plaintiff from pursuing his defamation claim in state court. Rather, the *Paul* Court rejected the notion that reputational interests are protected under the Fourteenth Amendment, not because a state tort remedy was actually available to the *Paul* plaintiff, but rather because reputational interests are the sort of interests that states can and often do protect. *Paul*, 424 U.S. at 712 (The states "*may* protect [reputational interests] against injury by virtue of its tort law, providing a forum for vindication by means of damages actions." (emphasis added)).

In *Siegert*, this Court applied the reasoning of *Paul* to reject a defamation-based *Bivens* claim brought by a federal government psychologist against his former supervisor. *Siegert*, 500 U.S. 226 (1991). The Court so held despite the fact that no common law defamation claim could lie against the government under the Federal Tort Claims Act (FTCA), *see* 28 U.S.C. § 2680(h). *Siegert*, 500 U.S. at 234. Nor did the *Siegert* Court consider whether the individual defendant himself was shielded by the FTCA's discretionary function exemption, *see* 28 U.S.C. § 2680(a), or some other statutory, constitutional or common law defense or immunity. As in *Paul*, the Court in *Siegert* did not base its ruling on whether a state or federal common law tort remedy was available to the plaintiff, but rather on the fact that "defamation . . . is a tort actionable under the law of *most* states, but not a constitutional deprivation." *Siegert*, 500 U.S. at 234 (emphasis added).

government into "traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution.")[28/]

Starkly contravening the spirit of *Paul*, the Court of Appeals held that a plaintiff meets the plus factor requirement if he merely "points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state law defamation suit." *Doe*, 271 F.3d at 56. Alternately, the Court of Appeals suggested that a plaintiff need show only that a governmental defendant acted in a way that was "governmental in nature" and "not trivial." *Id.* at 54-55.

This milquetoast formulation clearly expands *Paul*'s narrow plus test, and manifestly undermines the important federalism concerns that *Paul* was based upon, broadly sweeping reputational interests of traditional state concern into the ambit of the Fourteenth Amendment. There will exist some "indicium of material government involvement unique to the government's public role" in virtually every claim against a state actor. *Id.* at 56. By simple force of the fact that the alleged defamatory statement was uttered by a governmental agency or official acting in his official capacity, the statement, carrying as it does the added force of an official act, is distinguishable from that of a private person. However, as *Paul* indisputably established, not every defamatory governmental statement -- even those unique to the government's role as government -- states a constitutional claim.

It is no limitation at all to premise the availability of a constitutional due process claim on whether the defendant is acting

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28/ *See also Daniels v. Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." (internal citations omitted)). *Albright v. Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, *J.*, concurring) ("The common sense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer." (citing *Parratt v. Taylor*, 451 U.S. 527, 544 (1981)).

in a manner unique to the government's public role. Rather, this limitation is largely illusory given that 42 U.S.C. § 1983 applies only to acts taken "under color of state law." *See, e.g., Parratt*, 451 U.S. 527, 549 (1981) (Powell, *J.* concurring) ("To be sure, even where there has been an intentional deprivation of property, due process claims also must satisfy the requirement that the act be sufficiently linked to an official's state-created duties or powers to constitute 'state action.'").

Perhaps the best evidence that the Court of Appeals' test exceeded this Court's circumscribed holding in *Paul* is that the unsuccessful *Paul* plaintiff would likely have prevailed under the Second Circuit's permissive standard. Certainly, the act of compiling and distributing a list of names of active shoplifters as challenged in *Paul* -- a listing that included photographs and bore the imprimatur of both city and county law enforcement agencies -- was a "material government involvement unique to the government's public role." *Doe v. Public Safety*, 271 F.3d at 56.

The facts of *Paul* would appear to present a far stronger case than the respondent's challenge to the SORL's registration requirements. In *Paul*, individuals were identified as "active" shoplifters based merely on arrests, not convictions, and the shoplifting charges against the plaintiff in *Paul* were ultimately dismissed. *See Paul*, 424 U.S. at 695-96. Connecticut's registry, on the other hand, identifies only those who were convicted of enumerated offenses after receiving the full panoply of protections available in the criminal process. Moreover, the active shoplifter list at issue in *Paul* was sent unsolicited to merchants, in contrast to Connecticut's registry, which provides information only to individuals requesting it on the Internet or at local law enforcement agencies.[29/]

29/ The Court of Appeals' reformulation of the *Paul* test would also have resulted in different outcomes in two of this Court's principal cases relied on in *Paul*. In *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), the plaintiffs challenged the United States Attorney General's listing of certain organizations as communist and his sharing of the list with the federal Civil Service Commission. According to the *Paul* Court's reading of *McGrath*, six of the eight participating justices agreed that the

In finding the existence of adequate plus factors, the Court of Appeals engaged in unprecedented and unsupported extensions of this Court's precedent, disregarding the fundamental distinction between tort and § 1983 law. While this sort of judicial stretching would be notable under any circumstances, it is particularly remarkable in a case governed by this Court's decision in *Paul*, a decision intended to impose substantial limitations on governmental defamation claims.

B. The Court Of Appeals Erroneously And Illogically Uncoupled The Plus Factor From The Alleged Stigma.

Relying solely on two of its own prior decisions, the Court of Appeals stated that the asserted plus factor need not result from the stigmatizing government act or practice. Rather, the Court of Appeals requires only that a "concurrent temporal link," in no

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designation and distribution of the Attorney General's list, absent an effect on tax, employment or other legal status, would be insufficient to state a due process claim. *Id.* at 704-705. Clearly, however, the Attorney General's designation and distribution represented material, uniquely governmental conduct that would qualify under the Court of Appeals' approach as an adequate plus showing.

Similarly, in *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), the individual plaintiff would clearly have met the Court of Appeals' plus test, but was deemed by this Court not to have stated a due process claim. The plaintiff was a short-order cook employed by a private food vendor at the Naval Gun Factory in Washington, D.C., a weapons production facility operated on federal land. The naval security officer for the facility and his supervisor, a Rear Admiral, determined without a hearing that the plaintiff had failed to meet minimum security requirements, resulting in her inability to enter her workplace. Clearly, making security clearance determinations is a material governmental act unique to its public role that would satisfy the Court of Appeals' plus test. Indeed, the Court in *McElroy* noted that in making a security determination the defendants had acted "in a proprietary military capacity;" that is to say, security determinations are uniquely governmental. *McElroy*, 367 U.S. at 896. Nevertheless, the Court ruled that the plaintiff had no constitutional right to a hearing prior to revocation of her security clearance. *Id.*

particular order, exist between the two. *Doe v. Public Safety*, 271 F.3d at 60 (citing *Martz v. Inc. Vill. of Valley Stream*, 22 F.3d 26, 32 (2d Cir. 1994); *Brandt v. Board of Coop. Educ. Services*, 820 F.2d 41, 44-45 (2d Cir. 1987)). Based on this understanding of the plus requirement, the Court of Appeals held that the "temporal nexus" between the SORL's registration requirements and the public access provisions sufficed to support the existence of a liberty interest. *Doe v. Public Safety*, 271 F.3d at 60. Not suprisingly, this approach finds no support in this Court's prior decisions.

This Court requires the plaintiff in a constitutional defamation action to allege and prove that the existence of a plus factor is *caused* by the governmental defendant's allegedly stigmatizing conduct. As phrased by this Court in *Paul*, the plaintiff must show that "*as a result of the state action complained of*, a right or status previously recognized by state law was altered or extinguished." *Paul*, 424 U.S. at 693 (emphasis added). In describing the nature of the due process violation caused by the state "posting" statute in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the *Paul* Court stated that "the governmental action taken in that case deprived the individual of a right previously held under state law -- the right to purchase or obtain liquor in common with the rest of the citizenry. 'Posting,' therefore significantly altered her status as a matter of state law." *Paul*, 424 U.S. at 708; *see also Siegert*, 500 U.S. at 234. Plainly "the state action complained of" by the respondent in this case is the alleged defamatory statement implied by the Registry. The Court of Appeals did not, however, require as part of the respondent's due process showing that the alleged defamation caused a change in a right or status he previously held under Connecticut law.

Despite clear precedent from this Court requiring causation, the Court of Appeals excused the absence of a causal link between the alleged stigma and the identified plus factors by noting simply that its own precedent "has never required that the stigma and the plus arise from a single government act." *Doe v. Public Safety*, 271 F.3d at 60. Be that as it may, this Court's decisions even prior to *Paul* and *Siegert* made clear that the stigmatizing act and the plus

must arise from the same act or must flow inseparably one from the other. *See, e.g., United States v. Lovett*, 328 U.S. 303, 313-14 (1946); *McGrath*, 341 U.S. at 184-85; *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Peters v. Hobby*, 349 U.S. 331, 347 (1955); *McElroy*, 367 U.S. at 898; *Roth*, 408 U.S. at 577. Simply put, this Court has never recognized a procedural due process claim where the deprivation of a protected right or status (i.e., the "plus") is not caused by the alleged defamatory act of the governmental defendant.

Uncoupling the "plus" element from the stigma in favor of a "concurrent temporal link" requirement suggests no natural limits, creates real problems of application and offends basic principles of causation applicable in § 1983 actions. How far afield may a plaintiff search for a plus? At what point does the plus factor become too attenuated from the stigma? As long as the plus occurs in rough temporal proximity to the stigma, may any federal, state, or local regulation serve as a plus? The Court of Appeals did not appear to consider these questions, let alone answer them. On the other hand, requiring as this Court has, that the plus be "*a result of the state action complained of*," *Paul*, 424 U.S. at 696 (emphasis added), provides certainty as to limits and is consistent with principles of causation, which apply to claims made under § 1983. As this Court has held:

> The cardinal principle of damages in Anglo-American law is that of compensation for the injury *caused to plaintiff by defendant's breach of duty*. The Court implicitly has recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions found to have been violative of constitutional rights and *to have caused* compensable injury.

Carey v. Piphus, 435 U.S. 247, 254-55 (1978) (internal citations omitted) (emphasis added). The Court of Appeals' "temporal proximity" test entirely dispenses with the requirement of causation, thereby significantly broadening due process rights.

Not only did the Court of Appeals causally sever the plus factors from the asserted source of stigma, it approved a remedy that utterly failed to address those factors. Under the District Court's injunction, the asserted plus factors -- Connecticut's registration requirements -- remain fully operative. In approving this result, the Court of Appeals cavalierly sidestepped another fundamental precept of both tort and § 1983 law -- that the remedy be tailored to the wrong. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995). This represents an unwarranted departure from this Court's previous due process defamation cases, in which the remedies directly prevented or redressed the stigmatizing conduct of the defendants which had caused the deprivation of a liberty or property interest. *See, e.g., Constantineau*, 400 U.S. at 435 (affirming injunction against application of potentially stigmatizing "posting" statute, which interfered with right under state law to purchase alcohol).[30/] Clearly, to arrive at its decision, the Court of Appeals was forced not only to misapply this Court's decision in *Paul*, but also to disregard fundamental principles concerning causation and remedies.

C. The Plus Factors Identified By The Court Of Appeals Are Inadequate Under *Paul v. Davis*.

Under any construction of *Paul* or other precedent of this Court, the Court of Appeals' identification of plus factors was

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30/ *See also Goss v. Lopez*, 419 U.S. 565, 584 (1975) (affirming injunction against application of statute providing for summary school suspensions, which potentially damaged students' reputations and interfered with statutory right to free public education); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) (enjoining application of loyalty oath statute, which forbad payment of state employees who refused to take oath, where individuals potentially stigmatized by application of statute); *Peters v. Hobby*, 349 U.S. 331, 348-49 (1955) (holding that petitioner entitled to have expunged from record adverse finding by federal Loyalty Review Board, as well as any record of ruling that petitioner had been barred from federal employment as result of adverse loyalty finding).

erroneous. Significantly, the Court of Appeals did not find, as required by *Paul*, that the Registry's public access provisions had any impact at all on public or private employment or that they otherwise extinguished or altered a right or status "*previously recognized under state law.*" *Paul*, 424 U.S. at 711 (emphasis added). Rather, the Court of Appeals identified plus factors in the portions of Connecticut's statutory scheme that were not challenged at all as defamatory or stigmatizing, and that in fact remain in place under the District Court's injunction. These include the requirements of registration, address and photograph verification and updating, provision of a DNA sample, and vulnerability to criminal prosecution for failure to comply with registration requirements. While these provisions are not trivial and are essential to Connecticut's statutory scheme, they are not adequate under this Court's precedent to state a claim for deprivation of a liberty or property interest invoking due process protections.

The Court of Appeals characterized the SORL obligations imposed on registrants as "extreme and onerous," *see Doe v. Public Safety*, 271 F.3d at 57, but nowhere attempted to show that those obligations affected, let alone distinctly altered or extinguished, a right or status previously recognized by state law. Significantly, the Second Circuit did not point to any Connecticut law (or any other source of law) that granted convicted sex offenders an affirmative freedom from providing identifying information to state officials. Nor are such offenders disabled by the statutory scheme from seeking or receiving any state-created benefit or prevented from obtaining or retaining governmental or private employment. *See, e.g., Femedeer v. Haun*, 227 F.3d 1244, 1250 (10th Cir. 2000) (sex offenders are "free to live where they choose, come and go as they please, and seek whatever employment they may desire."). While registrants must comply with certain statutory requirements by virtue of their conviction status, they are simply not prevented by SORL from doing or receiving anything.

In fact, from a regulatory perspective, there is nothing inherently onerous or even particularly remarkable about SORL's registration requirements. "Registration laws are common and their range is wide." *Lambert v. California*, 355 U.S. 225, 229 (1957);

see also Russell v. Gregoire, 124 F.3d 1079, 1089 (9th Cir. 1997) ("[R]egistration is typically and historically a regulatory measure."), *cert. denied sub nom Stearns v. Gregoire*, 523 U.S. 1007 (1998). Indeed, many of the statutory requirements identified as plus factors by the Court of Appeals have been held by that court and others not to impose legally significant burdens even where the obligations fall on citizens not convicted of crimes. *See, e.g., Tadros v. Commissioner of Internal Revenue*, 763 F.2d 89, 91 (2d Cir. 1985) (responsibility of taxpayer to provide change of address information not onerous); *St. Louis v. Alverno College*, 744 F.2d 1314, 1316 (7th Cir. 1984) (the burden of providing a change of address is minimal).[31/]

The Court of Appeals' misapplication of the plus requirement becomes more apparent still when contrasted against the types of deprivations this Court has held to implicate procedural due process protections. In fact, this Court's constitutional defamation decisions have typically required some significant interference with governmental employment before a due process claim can lie, harm clearly not alleged by the respondent in this case. *See Paul*, 424 U.S. at 706. ("This Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent accompanying loss of government employment."); *Lovett*, 328 U.S. at 314 (sustaining challenge to

31/ In fact, it is significant to note that in *Doe v. Pataki*, 120 F.3d 1265, 1285 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998), the Second Circuit Court of Appeals itself held in a closely related context that sexual offender registration requirements are not:

> so punitive in form or effect as to transform this regulatory measure into a punitive one. For instance, registration itself, which can usually be accomplished without public notice, (1) does not ordinarily result even in societal opprobrium or harassment, (2) does not serve the goals of criminal punishment and (3) does not resemble any measure traditionally considered punishment . . . Moreover, the legislature's decision to subject persons with a greater risk of re-offense to more onerous registration requirements is reasonable.

congressional act that forbade payment of any salary or compensation to specific governmental employees found to have engaged in subversive activity, noting that act "stigmatized [employees'] reputations and seriously impaired their chance to earn a living" and that act had effect of "prohibiting their ever holding government job."); *McGrath*, 341 U.S. at 184-85 ("[The plaintiff] not only may be discharged, but disqualified from employment, upon no other ground than such membership or sympathetic affiliation . . . . To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity.").[32/] Of course, Connecticut's registration requirements do not impair any registrant's interest in governmental employment.

Even if this Court's decisions suggest that a narrow range of interests beyond those relating to governmental employment may serve as plus factors, such interests, unlike those affected by the registrations provisions, involve a right or status previously recognized by state law. For example, in *Wisconsin v. Constantineau*, the challenged statute made it a misdemeanor to sell or give liquor to persons posted on a list of hazardous drinkers. *Constantineau*, 400 U.S. at 433 n. 2. As the Court noted in *Paul*, the governmental action challenged in *Constantineau* "deprived the individual of a right previously held under state law -- the right to purchase or obtain liquor in common with the rest of the citizenry."

32/ *See also Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (in finding requirement of executing state loyalty oath arbitrary, Court noted that petitioners would lose their teaching their positions at a state university for refusing to comply); *Peters v. Hobby*, 349 U.S. 331, 347 (1955) (noting impairment of interest in government employment in finding that Loyalty Review Board exceeded its powers); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961) (rejecting due process claim and noting that "this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an *attendant foreclosure from other employment opportunities*.") (emphasis added); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (recognizing that defamatory governmental action, in connection with refusal to rehire plaintiff, might state a procedural due process claim.).

Paul, 424 U.S. at 704. The Court noted further that "'[p]osting,' therefore, significantly altered [that individual's] status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified invocation of procedural safeguards." *Id.* at 704-05. Those subject to "posting," who were presumably otherwise qualified under Wisconsin's then-existing regulatory scheme to purchase alcohol, clearly suffered an alteration in a right and status previously recognized under Wisconsin law because of the posting. Conversely, Connecticut's registration requirements do not alter any previously recognized right or status held by convicted sex offenders.

Other interests that this Court has suggested might, when combined with governmental defamation, invoke the protections of procedural due process, include the revocation of the right to attend public schools or the loss of a tax exemption. *Paul*, 424 U.S. at 693, 710 (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1950) (tax exemption); and *Goss v. Lopez*, 419 U.S. 565 (1975) (public school)). For example, in *Goss v. Lopez*, a disciplinary school suspension, challenged as potentially defamatory and violative of due process, threatened the right to free public education guaranteed by state statute. *See Goss*, 419 U.S. at 567. Similarly, because tax exemptions like that at issue in *McGrath* only exist by virtue of statute and regulation, the revocation of such an exemption indisputably "alter[s] or exinguishe[s]" a "right or status previously recognized by . . . law." *Paul*, 424 U.S. at 711. The same simply cannot be said of Connecticut's registration requirements.

Because the "Fourteenth Amendment's procedural protection . . . is a safeguard of the security of interests that a person has already acquired in *specific* benefits," the registration requirements simply do not implicate the Amendment's due process guarantees. *Roth*, 408 U.S. at 576 (emphasis added). Moreover, this Court has held that the dimensions of an asserted interest must be recognized and defined by state law before it merits protection under the Due Process Clause. *Id.* at 577. Connecticut's registration requirements do not effect any interest that exists and is

specifically defined under state law. To the contrary, the respondent alleges merely an impairment of an intangible, amorphous interest in avoiding the imposition of governmentally created obligations that did not exist previously, but arise solely as a result of his conviction history. This hardly qualifies as the sort of concrete, definite, and previously recognized status or right anticipated in *Paul* as an adequate plus factor.

III. Conclusion

For the foregoing reasons, as well as those asserted in the supporting briefs of the Amici Curiae, the Court should reverse the decision of the Court of Appeals and remand with instructions to vacate the injunction entered by the District Court and direct judgment for the respondent. Connecticut's law does not deprive registrants of rights guaranteed by the Fourteenth Amendment; nor does it defame. To the contrary, the law at issue serves the vital interests of Connecticut's citizens by providing accurate, public information, information they should be free to evaluate, use or discard in deciding how best to protect themselves and their children. In this instance, the claims of the respondent "must yield to the dictates of public policy, which require that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins v. Sumner*, 13 Wis. 193, 197 (1860).

Respectfully submitted,

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No. _____

In The
Supreme Court Of The United States
October Term, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER
Petitioners,

v.

SAMUEL POE,
JOHN DOE
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

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REGISTRATION OF SEXUAL OFFENDERS

Sec. 54-250. Definitions. For the purposes of sections 54-102g and 54-250 to 54-259, inclusive:

(1) "Conviction" means a judgment entered by a court upon a plea of guilty, a plea of nolo contendere or a finding of guilty by a jury or the court notwithstanding any pending appeal or habeas corpus proceeding arising from such judgment.

(2) "Criminal offense against a victim who is a minor" means (A) a violation of subdivision (2) of Section 53-21, subdivision (2) of subsection (a) of section 53a-70, subdivision (2), (4) or (8) of subsection (a) of section 53a-71, subdivision (2) of subsection (a) of section 53a-72a, subdivision (2) of subsection (a) of section 53a-86, subdivision (2) of subsection (a) of section 53a-87, section 53a-196a, 53a-196b, 53a-196c or 53a-196d, (B) a violation of section 53a-92, 53a-92a, 53a-94, 53a-94a, 53a-95, 53a-96 or 53a-186, provided the court makes a finding that, at the time of the offense, the victim was under eighteen years of age, (C) a violation of any of the offenses specified in subparagraph (A) or (B) of this subdivision for which a person is criminally liable under section 53a-8, 53a-48 or 53a-49, or (D) a violation of any predecessor statute to any offense specified in subparagraph (A), (B) or (C) of this subdivision the essential elements of which are substantially the same as said offense.

(3) "Identifying factors" means fingerprints, a photographic image, and a description of any other identifying characteristics as may be required by the Commissioner of Public Safety. The commissioner shall also require a sample of the registrant's blood taken for DNA (deoxyribonucleic acid) analysis, unless such sample has been previously obtained in accordance with section 54-102g.

(4) "Mental abnormality" means a congenital or acquired conditions of a person that affects the emotional or volitional capacity of the person in a manner that

predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(5) "Nonviolent sexual offense" means a violation of section 53a-73a.

(6) "Not guilty by reason of mental disease or defect" means a finding by a court or jury of not guilty by reason of mental disease or defect pursuant to section 53a-13 notwithstanding any pending appeal or habeas corpus proceeding arising from such finding.

(7) "Personality disorder" means a condition as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association.

(8) "Registrant" means a person required to register under section 54-251, 54-252, 54-253 or 54-254.

(9) "Registry" means a central record system in this state, any other state or the federal government that receives, maintains and disseminates information on persons convicted or found not guilty by reason of mental disease or defect of criminal offenses against victims who are minors, nonviolent sexual offenses, sexually violent offenses and felonies found by the sentencing court to have been committed for a sexual purpose.

(10) "Release into the community" means, with respect to a conviction or a finding of not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor, a nonviolent sexual offense, a sexually violent offense or a felony found by the sentencing court to have been committed for a sexual purpose, (A) any release by a court after such conviction or finding of not guilty by reason of mental disease or defect, a sentence of probation or any other sentence under section 53a-28 that does not result in the offender's immediate placement in the custody of the Commissioner of Correction; (B) release from a correctional facility at the discretion of the Board of

Parole, by the Department of Correction to a program authorized by section 18-100c or upon completion of the maximum term or terms of the offender's sentence or sentences, or to the supervision of the office of Adult Probation in accordance with the terms of the offender's sentence; or (C) release from a hospital for mental illness or a facility for persons with mental retardation by the Psychiatric Security Review Board on conditional release pursuant to section 17a-588 or upon termination of commitment to the Psychiatric Security Review Board.

(11) "sexually violent offense" means (A) a violation of section 53a-70, except subdivision (2) of subsection (a) of said section, 53a-70a, 53a-70b, 53a-71, except subdivision (1), (4) or (8) of subsection (a) of said section, 53a-72a, except subdivision (2) of subsection (a) of said section, or 53a-72b, or of section 53a-92 or 53a-92a, provided the court makes a finding that the offense was committed with intent to sexually violate or abuse the victim, (B) a violation of any of the offenses specified in subparagraph (A) of this subdivision for which a person is criminally liable under section 53a-8, 53a-48 or 53a-49, or (C) a violation of any predecessor statute to any of the offenses specified in subparagraph (a) or (B) of this subdivision the essential elements of which are substantially the same as said offense.

(12) "Sexual purpose" means that a purpose of the defendant in committing the felony was to engage in sexual contact or sexual intercourse with another person without that person's consent. A sexual purpose need not be the sole purpose of the commission of the felony. The sexual purpose may arise at any time in the course of the commission of the felony.

Sec. 54-251. Registration of person who has committed a criminal offense against a victim who is a minor or a nonviolent sexual offense. (a) Any person who has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor or a nonviolent sexual offense, and is released into the community on or after October 1, 1998, shall, within three days following such release, and whether or not such person's place of residence is in this state, register such person's name, identifying factors, criminal history record and residence address with the Commissioner of Public Safety, on such forms and in such locations as the commissioner shall direct, and shall maintain such registration for ten years except that any person who has one or more prior convictions of any such offense or who is convicted of a violation of subdivision (2) of subsection (a) of section 53a-70 shall maintain such registration for life. Prior to accepting a plea of guilty or nolo contendere from a person with respect to a criminal offense against a victim who is a minor or a nonviolent sexual offense, the court shall (1) inform the person that the entry of a finding of guilty after section 53a-70 shall maintain such registration for life. Prior to accepting a plea of guilty or nolo contendere from a person with respect to a criminal offense against a victim who is a minor or a nonviolent sexual offense, the court shall (1) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (2) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. If any person who is subject to registration under this section regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall notify the Commissioner of Public Safety and shall also register with an appropriate agency in that state provided that state has a registration requirement for such

offenders. During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Public Safety.

(b) Notwithstanding the provisions of subsection (a) of this section, the court may exempt any person who has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (1) of subsection (a) of section 53a-71 from the registration requirements of this section if the court finds that such person was under nineteen years of age at the time of the offense and that registration is not required for public safety.

(c) Notwithstanding the provisions of subsection (a) of this section, the court may exempt any person who has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (2) of subsection (a) of section 53a-73a from the registration requirements of this section if the court finds that registration is not required for public safety.

(d) Any person who violates the provisions of this section shall be guilty of a class D felony.

Sec. 54-252. Registration of person who has committed a sexually violent offense.

(a) Any person who has been convicted or found not guilty by reason of mental disease or defect of a sexually violent offense, and (1) is released into the community on or after October 1, 1988, and prior to October 1, 1998, and resides in this state, shall, on October 1, 1998, or within three days of residing in this state, whichever is later, or (2) is released into the community on or after October 1, 1998, shall, within three days following such release, register such person's name, identifying factors, criminal history record, documentation of any treatment received for mental abnormality or personality disorder, and residence address with the Commissioner of Public Safety on such forms and in such locations as said commissioner shall direct, and shall maintain such registration for life. Prior to accepting a plea of guilty or nolo contendere from a person with respect to a sexually violent offense, the court shall (A) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (B) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another requirements of this section, and (B) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. If any person who is subject to registration under this section regularly travels into or within another

state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall notify the Commissioner of Public Safety and shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Public Safety.

(b) Any person who has been subject to the registration requirements of section 54-102r of the general statutes, revised to January 1, 1997, as amended by section 1 of public act 97-183, shall, not later than three working days after October 1, 1998, register under this section and thereafter comply with the provisions of sections 54-102g and 54-250 to 54-259, inclusive.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, during the initial registration period following October 1, 1998, the Commissioner of Public Safety may phase in completion of the registration procedure for persons released into the community prior to said date over the first three months following said date, and no such person shall be prosecuted for failure to register under this section during those three months provided such person complies with the directives of said commissioner regarding registration procedures.

(d) Any person who violates the provisions of this section shall be guilty of a class D felony.

Section 54-253. Registration of person who has committed a sexual offense in another jurisdiction. (a) Any person who has been convicted or found not guilty by reason of mental disease or defect in any other state, in a federal or military court or in any foreign jurisdiction of any crime, the essential elements of which are substantially the same as any of the crimes specified in subdivisions (2), (5) and (11) of section 54-250 and who resides in this state on and after October 1, 1998, shall, within ten days of residing in this state, register with the Commissioner of Public Safety in the same manner as if such person had been convicted or found not guilty by reason of mental disease or defect of such crime in this state, except that for purposes of determining the ten-year period of registration under section 54-251 such person shall be deemed to have initially registered on the date of such person's release into the community in such other state, federal or military system or foreign jurisdiction.

(b) Any person not a resident of this state who is registered as a sexual offender under the laws of any other state and who regularly travels into or within this state or temporarily resides in this state for purposes including, but not limited to employment or schooling shall, within three days after the offender under the laws of any other state and who regularly travels into or within this state or temporarily resides in this state for purposes including, but not limited to employment or schooling shall, within three days after the commencement of such travel or residence in this state, register such person's name, identifying factors, criminal history record, locations visited on a recurring basis or residence address, if any, in this state, and residence address in such person's home state with the Commissioner of Public Safety on such forms and in such locations as said commissioner shall direct and shall maintain such registration until such travel or residence terminates or until

such person is released from registration as a sexual offender in such other state. If such person terminates such person's travel or residence in this state or changes such person's address in this state such person shall, within five days, provide notice in writing to the Commissioner of Public Safety.

(c) Any person who violates the provisions of this section shall be guilty of a class D felony.

Sec. 54-254. Registration of person who has committed a felony for a sexual purpose. (a) Any person who has been convicted or found not guilty by reason of mental disease or defect in this state on or after October 1, 1998, of any felony that the court finds was committed for a sexual purpose, may be required by the court upon release into the community to register such person's name, identifying factors, criminal history record and residence address with the Commissioner of Public Safety, on such forms and in such locations as the commissioner shall direct, and to maintain such registration for ten years. If the court finds that a person has committed a felony for a sexual purpose and intends to require such person to register under this section, prior to accepting a plea of guilty or nolo contendere from such person with respect to such felony, the court shall (1) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (2) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. If any person who is subject to registration under this section regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall notify the Commissioner of Public Safety and shall also register with

an appropriate agency in that state, provided that state has a registration requirement for such offenders. During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Public Safety.

(b) Any person who violates the provisions of this section shall be guilty of a class D felony.

Sec. 54-255. Restriction on dissemination of registration information for certain offenders. (a) Upon the conviction or finding of not guilty by reason of mental disease or defect of any person for a violation of section 53a-70b, the court may order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, provided the court finds that dissemination of the registration information is not required for public safety and that publication of the registration information would be likely to reveal the identity of the victim within the community where the victim resides. The court shall remove the restriction on the dissemination of such registration information if, at any time, the court finds that public safety requires that such person's registration information be made available to the public or that a change of circumstances makes publication of such registration information no longer likely to reveal the identity of the victim within the community where the victim resides. Prior to ordering or removing the restriction on the such person's registration information be made available to the public or that a change of circumstances makes publication of such registration information no longer likely to reveal the identity of the victim within the community where the victim resides. Prior to ordering or removing the restriction on the dissemination of such person's registration information, the court shall consider any information or statements provided by the victim.

(b) Upon the conviction or finding of not guilty by reason of mental disease or defect of any person of a criminal offense against a victim who is a minor, a nonviolent sexual offense or a sexually violent offense, where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in

section 46b-21, the court may order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, provided the court finds that dissemination of the registration information is not required for public safety and that publication of the registration information would be likely to reveal the identity of the victim within the community where the victim resides. The court shall remove the restriction on the dissemination of such registration information if, at any time, it finds that public safety requires that such person's registration information be made available to the public or that a change in circumstances makes publication of the registration information no longer likely to reveal the identity of the victim within the community where the victim resides.

(c) Any person who: (1) Has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (1) of subsection (a) of section 53a-71 between October 1, 1988, and June 30, 1999, and was under nineteen years of age at the time of the offense; (2) has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (2) of subsection (a) of section 53a-73a between October 1, 1988, and June 30, 1999; (3) has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor, a nonviolent sexual offense or a sexually violent offense, between October 1, 1988, and June 30, 1999, where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in section 46b-21; (4) has been convicted or found not guilty by reason of mental disease or defect of a violation of section 53a-70b between October 1, 1988, and June 30, 1999; or (5) has been convicted or found not

guilty by reason of mental disease or defect of any crime between October 1, 1988, and September 30, 1998, which requires registration under sections 54-250 to 54-259, inclusive, and (A) served no jail or prison time as a result of such conviction or finding of not guilty by reason of mental disease or defect, (B) has not been subsequently convicted or found not guilty by reason of mental disease or defect of any crime which would require registration under sections 54-250 to 54-259, inclusive, and (C) has registered with the Department of Public Safety in accordance with sections 54-250 to 54-259, inclusive; may petition the court to order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, provided the court finds that dissemination of the registration information is not required for public safety.

Sec. 54-256. Responsibilities of courts and agencies in registration process. Any court, the Commissioner of Correction or the Psychiatric Security Review Board, prior to releasing into the community any person convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor, a nonviolent sexual offense, a sexually violent offense or a felony found by the sentencing court to have been committed for a sexual purpose, except a person being released unconditionally at the conclusion of such person's sentence or commitment, shall require as a condition of such release that such person complete the registration procedure established by the Commissioner of Public Safety under sections 54-251, 54-252 and 54-254. The court, the Commissioner of Correction or the Psychiatric Security Review Board, as the case may be, shall provide the person with a written summary of the person's obligations under sections 54-102g and 54-250 to 54-259, inclusive, and transmit the completed registration package to the Commissioner of Public Safety who shall enter the information into the registry established under section 54-257. If a court transmits the completed registration package to the Commissioner of Public Safety with respect to a person released by the court, such package need not include identifying factors for such person. In the case of a person being released unconditionally who declines to complete the 54-257. If a court transmits the completed registration package to the Commissioner of Public Safety with respect to a person released by the court such package need not include identifying factors for such person. In the case of a person being released unconditionally who declines to complete the registration package through the court or the releasing agency, the court or agency shall: (1) Except with respect to information that is not available to the public pursuant to court order, rule of court or any provision of the general statutes, provide to the

Commissioner of Public Safety the person's name, date of release into the community, anticipated residence address, if known, criminal history record, any known treatment history and any other relevant information; (2) inform the person that such person has an obligation to register within three days with the Commissioner of Public Safety for a period of ten years following the date of such person's release or for life, as the case may be, and that if such person changes such person's address such person shall within five days register the new address in writing with the Commissioner of Public Safety and, if the new address is in another state or if such person regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders; (3) provide the person with a written summary of the person's obligations under sections 54-102g and 54-250 to 54-259, inclusive, as explained to the person under subdivision (2) of this section; and (4) make a specific notation on the record maintained by that agency with respect to such person that the registration requirements were explained to such person and that such person was provided with a written summary of such person's obligations under sections 54-102g and 54-250 to 54-259, inclusive.

Sec. 54-257. Registry. Suspension of registration. Verification of address. (a) The Department of Public Safety shall, not later than January 1, 1999, establish and maintain a registry of all persons required to register under sections 54-251, 54-252, 54-253 and 54-254. The department shall, in cooperation with the Office of the Chief Court Administrator, the Department of Correction and the Psychiatric Security Review Board, develop appropriate forms for use by agencies and individuals to report registration information, including changes of address. Upon receipt of registration information, the department shall enter the information into the registry and notify the local police department or state police troop having jurisdiction where the registrant resides or plans to reside. If a registrant reports a residence in another state, the department shall notify the state police agency of that state or such other agency in that state that maintains registry information, if known. The department shall also transmit all registration information, conviction data, photographic images and fingerprints to the Federal Bureau of Investigation in such form as said bureau shall require for inclusion in a national registry.

(b) The Department of Public Safety may suspend the registration of any person registered under section 54-251, 54-252, 54-253 or 54-254 while such under civil commitment or residing outside this state. During the period that such registration is under suspension, the department is not required to verify the address of the registrant pursuant to subsection (c) of this section and may withdraw the registration information from public access. Upon the release of the registrant from incarceration or civil commitment or resumption of residency in this state by the registrant, the department shall reinstate the registration, redistribute the registration information in accordance with subsection (a) of this section and resume verifying the

address of the registrant in accordance with subsection (c) of this section. Suspension of registration shall not affect the date of expiration of the registration obligation of the registrant under section 54-251, 54-252 or 54-253.

(c) Except as provided in subsection (b) of this section, the Department of Public Safety shall verify the address of each registrant by mailing a nonforwardable verification form to the registrant at the registrant's last reported address. Such form shall require the registrant to sign a statement that the registrant continues to reside at the registrant's last reported address and return the form by mail by a date which is ten days after the date such form was mailed to the registrant. The form shall contain a statement that failure to return the form or providing false information is a violation of section 54-251, 54-252, 54-253 or 54-254, as the case may be. Each person required to register under section 54-251 or 54-254 shall have such person's address verified in such manner annually on the anniversary of such person's initial registration date. Each person required to register under section 54-252 shall have such person's address verified in such manner every ninety days after such person's initial registration date. Each person required to register under section 54-253 shall have such person's address verified in such manner either annually on the anniversary of such person's initial registration date or every ninety days after such person's initial registration date depending upon whether, after such initial registration, such person is subject to the requirements of section 54-251 or section 54-252, respectively. In the event that a registrant fails to return the address verification form, the Department of Public Safety shall notify the local police department or the state police troop having jurisdiction over the registrant's last reported address, and that agency shall apply for a warrant to be issued for the registrant's arrest under

section 54-251, 54-252, 54-253 or 54-254, as the case may be. The Department of Public Safety shall not verify the address of registrants whose last reported address was outside this state.

(d) The Department of Public Safety shall retake the photographic image of each registrant at least once every five years.

Sec. 54-258. Availability of registration information. Immunity. (a)(1) Notwithstanding any other provision of the general statutes, except subdivisions (3) and (4) of this subsection, the registry maintained by the Department of Public Safety shall be a public record and shall be accessible to the public during normal business hours. The Department of Public Safety shall make registry information available to the public through the Internet. Not less than once per calendar quarter, the Department of Public Safety shall issue notices to all print and electronic media in the state regarding the availability and means of accessing the registry. Each local police department and each state police troop shall keep a record of all registration information transmitted to it by the Department of Public Safety, and shall make such information accessible to the public during normal business hours.

(2) Any state agency, the Judicial Department, any state police troop or any local police department may, at its discretion, notify any government agency, private organization or individual of registration information when such agency, said department, such troop or such local police department, as the case may be, believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration under private organization or individual of registration information when such agency, said department, such troop or such local police department, as the case may be, believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration under section 54-251, 54-252, 54-253 or 54-254.

(3) Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, state agencies, the Judicial Department, state police troops and local police

departments shall not disclose the identity of any victim of a crime committed by a registrant or treatment information provided to the registry pursuant to sections 54-102g and 54-250 to 54-259, inclusive, except to government agencies for bona fide law enforcement or security purposes.

(4) Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, registration information the dissemination of which has been restricted by court order pursuant to section 54-255 and which is not otherwise subject to disclosure, shall not be a public record and shall be released only for law enforcement purposes until such restriction is removed by the court pursuant to said section.

(5) When any registrant completes the registrant's term of registration or is otherwise released from the obligation to register under section 54-251, 54-252, 54-253 or 54-254, the Department of Public Safety shall notify any state police troop or local police department having jurisdiction over the registrant's last reported residence address that the person is no longer a registrant, and the Department of Public Safety, state police troop and local police department shall remove the registrant's name and information from the registry.

(b) Neither the state nor any political subdivision of the state nor any officer or employee thereof, shall be held civilly liable to any registrant by reason of disclosure of any information regarding the registrant that is released or disclosed in accordance with subsection (a) of this section. The state and any political subdivision of the state and, except in cases of wanton, reckless or malicious conduct, any officer or employee thereof, shall be immune from liability for good faith conduct in carrying out the provisions of subdivision (2) of subsection (a) of this section.

Sec. 54-258a. Warning against wrongful use of registry information. Any agency of the state or any political subdivision thereof that provides public access to information contained in the registry shall post a warning that states: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." Such warning shall be in a suitable size and location to ensure that it will be seen by any person accessing registry information.

Sec. 54-259. Sexual Offender Registration Committee. (a) There is established a Sexual Offender Registration Committee consisting of the following members or their designees: The Chief Court Administrator, the Chief State's Attorney, the Commissioner of Public Safety, the Commissioner of Correction, the Secretary of the Office of Policy and Management, the chairman of the Psychiatric Security Review Board, the chairman of the Board of Parole, the director of the Office of Adult Probation, the President of the Connecticut Police Chiefs Association and two persons appointed by the Governor, one of whom shall be involved in the delivery of services to victims of sexual assault and one of whom shall be involved in the delivery of services to victims of crime. The Chief Court Administrator shall serve as chairperson of the committee. The Office of Policy and Management shall, within available resources, provide staff resources to the committee.

(b) On or before January 15, 1999, the Sexual Offender Registration Committee shall submit a report to the Governor and the General Assembly. Such report shall make recommendations concerning the implementation of sections 54-102g and 54-250 to 54-259, inclusive, and shall address issues including (1) assuring interagency coordination to maximize the accuracy and timeliness of shall submit a report to the Governor and the General Assembly. Such report shall make recommendations concerning the implementation of sections 54-102g and 54-250 to 54-259, inclusive, and shall address issues including (1) assuring interagency coordination to maximize the accuracy and timeliness of information contained in the registry, (2) complying with other applicable state and federal laws and regulations, (3) establishing a procedure by which registrants may apply to the sentencing court, not sooner than ten years after initial registration, to be relieved of their obligation to register, (4) establishing a board of

experts in the behavior and treatment of sexual offenders, to examine such applicants and make recommendations to the court in accordance with section 54-255, (5) developing guidelines for the state police and municipal police departments that shall set forth the circumstances in which individuals, private organizations and government agencies in their respective jurisdictions should be directly notified that a person subject to registration under sections 54-102g and 54-250 to 54-259, inclusive, is residing near their locations, and (6) any other fiscal, legislative and programmatic matters which affect the successful implementation of the registry.

Sec. 54-260. (Formerly Sec. 54-102s). Notification of change of address of sexual offenders on parole or probation. (a) For the purposes of this section, "sexual offender" means any person convicted of a violation of subdivision (2) of section 53-21, section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b committed on or after October 1, 1995.

(b) Any sexual offender who is released from a correctional institution on parole or who is sentenced to a period of probation shall, during the period of such parole or probation and as a condition of such parole or probation, immediately notify his parole officer or probation officer, as the case may be, whenever he changes his residence address. Each parole officer or probation officer who is notified of such change of address shall notify the chief of police of the police department or resident state trooper for the municipality of the new address of the parolee or probationer and any other law enforcement official he deems appropriate.

(c) Nothing in this section shall be construed to prohibit a parole officer or probation officer acting in the performance of his duties and within the scope of his employment from disclosing any information concerning the parolee or probationer to any person whenever he deems such disclosure to be appropriate.

Sec. 54-261. Community response education program. (a) The Office of Adult Probation, in conjunction with state-wide experts in law enforcement, the treatment of sexual offenders and sexual assault victim services, shall, within available appropriations, develop a community response education program to be offered to neighborhoods and municipalities that have been notified pursuant to section 54-258 that a person who has registered under said section is or will be residing in that community.

(b) The purpose of such program shall be to assist neighborhoods, parents and children to learn how to better protect themselves from sexual abuse and sexual assault. The program shall develop educational materials and community information resources on prevention and risk reduction concerning sexual abuse and sexual assault and the enforcement of requirements concerning the registration and supervision of sexual offenders and the notification of communities where such offenders reside.

(c) The program may include the following:

(1) An initial community meeting following a community notification, sponsored by the Office of Adult Probation and held in conjunction with the chief of police, chief elected officials, the superintendent of schools and other municipal officials of the community, to discuss the implementation of the statutory requirements concerning the registration of a sexual offender and the notification of the community where such offender resides, to provide information on the crime or crimes involved and to provide information on how the offender will be monitored by the Office of Adult Probation and the specific conditions of probation applicable to the offender;

(2) Information on how and where concerned residents may report observed violations by an offender of the conditions of such offender's probation;

(3) Resources to educate families and children in the prevention and avoidance of sexual abuse and sexual assault and for parents seeking supportive methods for discussing relevant issues with their children;

(4) Resources on when and how a community may wish to establish a network of "Safe Houses" for neighborhood children to use when they seek safe shelter or the creation of a neighborhood block watch or crime watch;

(5) Resources for police departments and boards of education to use in consulting with parents on appropriate school-based classroom programs stressing safety, prevention and risk reduction and to use in developing educational programs for parents to discuss relevant issues with their children;

(6) Compilation and distribution of a list of child protective agencies, child guidance clinics and rape crisis centers for families seeking more in-depth counseling after a community notification has occurred.

(d) The Office of Adult Probation may apply for and receive grants from the federal government or any agency thereof or from any foundation, corporation, association or individual for purposes of the development of the community response education program under this section.

42 U.S.C. 14071 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program

(a) In general.

(1) State guidelines. The Attorney General shall establish guidelines for State programs that require--

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of subsection (b)(6); and

(B) a person who is a sexually violent predator to register a current address unless such requirement is terminated under subparagraph (B) of subsection (b)(6).

(2) Determination of sexually violent predator status; waiver; alternative measures.

(A) In general. A determination of whether a person is a sexually violent predator for purposes of this section shall be made by a court after considering the recommendation of a board composed of experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies.

(B) Waiver. The Attorney General may waive the requirements of subparagraph (A) if the Attorney General determines that the State has established alternative procedures or legal standards for designating a person as a sexually violent predator.

(C) Alternative measures. The Attorney General may also approve alternative measures of comparable or

greater effectiveness in protecting the public from unusually dangerous or recidivistic sexual offenders in lieu of the specific measures set forth in this section regarding sexually violent predators

(3) Definitions. For purposes of this section:

(A) The term "criminal offense against a victim who is a minor" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the following range of offenses:

(i) kidnapping of a minor, except by a parent;
(ii) false imprisonment of a minor, except by a parent;
(iii) criminal sexual conduct toward a minor;
(iv) solicitation of a minor to engage in sexual conduct;
(v) use of a minor in a sexual performance;
(vi) solicitation of a minor to practice prostitution;
(vii) any conduct that by its nature is a sexual offense against a minor; or
(viii) an attempt to commit an offense described in any of clauses (i) through (vii), if the State--

(I) makes such an attempt a criminal offense; and
(II) chooses to include such an offense in those which are criminal offenses against a victim who is a minor for the purposes of this section.

For purposes of this subparagraph conduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger.

(B) The term "sexually violent offense" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the range of

offenses encompassed by aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code, or as described in the State criminal code) or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of title 18, United States Code, or as described in the State criminal code).

(C) The term "sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

(D) The term "mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(E) The term "predatory" means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(F) The term "employed, carries on a vocation" includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(G) The term "student" means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary

school, trade, or professional institution, or institution of higher education.

(b) Registration requirement upon release, parole, supervised release, or probation. An approved State registration program established under this section shall contain the following elements:

(1) Duties of responsible officials.

(A) If a person who is required to register under this section is released from prison, or placed on parole, supervised release, or probation, a State prison officer, the court, or another responsible officer or official, shall--

(i) inform the person of the duty to register and obtain the information required for such registration;

(ii) inform the person that if the person changes residence address, the person shall report the change of address as provided by State law;

(iii) inform the person that if the person changes residence to another State, the person shall report the change of address as provided by State law and comply with any registration requirement in the new State of residence, and inform the person that the person must also register in a State where the person is employed, carries on a vocation, or is a student;

(iv) obtain fingerprints and a photograph of the person if these have not already been obtained in connection with the offense that triggers registration; and

(v) require the person to read and sign a form stating that the duty of the person to register under this section has been explained.

(B) In addition to the requirements of subparagraph (A), for a person required to register under subparagraph (B) of subsection (a)(1), the State case may be, shall obtain

the name of the person, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person.

(2) Transfer of information to State and FBI; participation in national sex offender registry.

(A) State reporting. State procedures shall ensure that the registration information is promptly made available to a law enforcement agency having jurisdiction where the person expects to reside and entered into the appropriate State records or data system. State procedures shall also ensure that conviction data and fingerprints for persons required to register are promptly transmitted to the Federal Bureau of Investigation.

(B) National reporting. A State shall participate in the national database established under section 170102(b) [42 USCS § 14072(b)] in accordance with guidelines issued by the Attorney General, including transmission of current address information and other information on registrants to the extent provided by the guidelines.

(3) Verification.

(A) For a person required to register under subparagraph (A) of subsection (a)(1), State procedures shall provide for verification of address at least annually.

(i)--(iv) [Deleted]

(B) The provisions of subparagraph (A) shall be applied to a person required to register under subparagraph (B) of subsection (a)(1), except that such person must verify the registration every 90 days after the date of the initial release or commencement of parole.

(4) Notification of local law enforcement agencies of changes in address. A change of address by a person required to register under this section shall be reported by the person in the manner provided by State law. State procedures shall ensure that the updated address information is promptly made available to a law enforcement agency having jurisdiction where the person will reside and entered into the appropriate State records or data system.

(5) Registration for change of address to another state. A person who has been convicted of an offense which requires registration under this section and who moves to another State, shall report the change of address to the responsible agency in the State the person is leaving, and shall comply with any registration requirement in the new State of residence. The procedures of the State the person is leaving shall ensure that notice is provided promptly to an agency responsible for registration in the new State, if that State requires registration.

(6) Length of registration. A person required to register under subsection (a)(1) shall continue to comply with this section, except during ensuing periods of incarceration, until--

(A) 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation; or

(B) for the life of that person if that person--

(i) has 1 or more prior convictions for an offense described in subsection(a)(1)(A); or

(ii) has been convicted of an aggravated offense described in subsection(a)(1)(A); or

(iii) has been determined to be a sexually violent predator pursuant to subsection (a)(2)

(7) Registration of out-of-State offenders, Federal offenders, persons sentenced by courts martial, and offenders crossing State borders. As provided in guidelines issued by the Attorney General, each State shall include in its registration program residents who were convicted in another State and shall ensure that procedures are in place to accept registration information from--

(A) residents who were convicted in another State, convicted of a Federal offense, or sentenced by a court martial; and

(B) nonresident offenders who have crossed into another State in order to work or attend school.

(c) Registration of offender crossing State border. Any person who is required under this section to register in the State in which such person resides shall also register in any State in which the person is employed, carries on a vocation, or is a student.

(d) Penalty. A person required to register under a State program established pursuant to this section who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed.

(e) Release of information.

(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.

(2) The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

(f) Immunity for good faith conduct. Law enforcement agencies, employees of law enforcement agencies and independent contractors acting at the direction of such agencies, and State officials shall be immune from liability for good faith conduct under this section.

(g) Compliance.

(1) Compliance date. Each State shall have not more than 3 years from the date of enactment of this Act [enacted Sept. 13, 1994] in which to implement this section, except that the Attorney General may grant an additional 2 years to a State that is making good faith efforts to implement this section.

(2) Ineligibility for funds.

(A) A State that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3765).

(B) Reallocation of funds. Any funds that are not allocated for failure to comply with this section shall be reallocated to States that comply with this section.

(h) Fingerprints. Each requirement to register under this section shall be deemed to also require the submission of a set of fingerprints of the person required to register, obtained in accordance with regulations prescribed by the Attorney General under section 170102(h) [42 USCS § 14072(h)].

(i) Grants to States for costs of compliance.

(1) Program authorized.

(A) In general. The Director of the Bureau of Justice Assistance (in this subsection referred to as the "Director") shall carry out a program, which shall be known as the "Sex Offender Management Assistance Program" (in this subsection referred to as the "SOMA program"), under which the Director shall award a grant to each eligible State to offset costs directly associated with complying with this section.

(B) Uses of funds. Each grant awarded under this subsection shall be--

(i) distributed directly to the State for distribution to State and local entities; and

(ii) used for training, salaries, equipment, materials, and other costs directly associated with complying with this section.

(2) Eligibility.

(A) Application. To be eligible to receive a grant under this subsection, the chief executive of a State shall, on an annual basis, submit to the Director an application (in such form and containing such information as the Director may reasonably require) assuring that--

(i) the State complies with (or made a good faith effort to comply with) this section; and

(ii) where applicable, the State has penalties comparable to or greater than Federal penalties for crimes listed in this section, except that the Director may waive the requirement of this clause if a State demonstrates an overriding need for assistance under this subsection.

(B) Regulations.

(i) In general. Not later than 90 days after the date of enactment of this subsection [enacted Oct. 30, 1998], the Director shall promulgate regulations to implement this subsection (including the information that must be included and the requirements that the States must meet) in submitting the applications required under this subsection. In allocating funds under this subsection, the Director may consider the annual number of sex offenders registered in each eligible State's monitoring and notification programs.

(ii) Certain training programs. Prior to implementing this subsection, the Director shall study the feasibility of incorporating into the SOMA program the activities of any technical assistance or training program established as a result of section 40152 of this Act [42 USCS § 13941]. In a case in which incorporating such activities into the SOMA program will eliminate duplication of efforts or administrative costs, the Director shall take administrative actions, as allowable, and make recommendations to Congress to incorporate such activities into the SOMA program prior to implementing the SOMA program.

(3) Authorization of appropriations. There is authorized to be appropriated to carry out this subsection, $ 25,000,000 for each of fiscal years 1999 and 2000.

42 U.S.C. 3756 Allocation and distribution of funds under formula grants (a) Subject to subsection (f), of the total amount appropriated for this part [42 USCS §§ 3750 et seq.] in any fiscal year, the amount remaining after setting aside the amount required to be reserved to carry out section 511 of this title [42 USCS § 3761] shall be set aside for section 502 [42 USCS § 3752] and allocated to States as follows:

(1) $ 500,000 or 0.25 percent, whichever is greater, shall be allocated to each of the participating States; and

(2) of the total funds remaining after the allocation under paragraph (1), there shall be allocated to each State an amount which bears the same ratio to the amount of remaining funds described in this paragraph as the population of such State bears to the population of all the States.

(b)(1) Each State which receives funds under subsection (a) of this section in a fiscal year shall distribute among units of local government, or combinations of units of local government, in such State for the purposes specified in section 501(b) [42 USCS § 3751(b)] that portion of such funds which bears the same ratio to the aggregate amount of such funds as the amount of funds expended by all units of local government for criminal justice in the preceding fiscal year bears to the aggregate amount of funds expended by the State and all units of local government in such State for criminal justice in such preceding fiscal year.

(2) In distributing funds received under this part among urban, rural, and suburban units of local government and combinations thereof, the State shall give priority to those jurisdictions with the greatest need.

(3) Any funds not distributed to units of local government under paragraph (2) shall be available for expenditure by the State involved.

(4) For purposes of determining the distribution of funds under paragraphs (1) and (2), the most accurate and complete data available for the fiscal year involved shall be used. If data for such fiscal year are not available, then the most accurate and complete data available for the most recent fiscal year preceding such fiscal year shall be used.

(c) No funds allocated to a State under subsection (a) or received by a State for distribution under subsection (b) may be distributed by the Director or by the State involved for any program other than a program contained in an approved application.

(d) If the Director determines, on the basis of information available during any fiscal year, that a portion of the funds allocated to a State for that fiscal year will not be required or that a State will be unable to qualify or receive funds under section 502 [42 USCS § 3752], or that a State chooses not to participate in the program established under such section, then such portion shall be awarded by the Director to urban, rural, and suburban units of local government or combinations thereof within such State giving priority to those jurisdictions with greatest need.

(e) Any funds allocated under subsection (a) or (f) that are not distributed under this section shall be available for obligation under subpart 2 [42 USCS §§ 3760 et seq.].

(f) (1) For any fiscal year beginning more than 2 years after the effective date of this subsection--

(A) 90 percent of the funds allocated under subsection (a) without regard to this subsection to a State

described in paragraph (2) shall be distributed by the Director to such State; and

(B) 10 percent of such funds shall be allocated equally among States that are not affected by the operation of subparagraph (A).

(2) Paragraph (1)(A) refers to a State that does not have in effect, and does not enforce, in such fiscal year, a law that requires the State at the request of the victim of a sexual act--

(A) to administer, to the defendant convicted under State law of such sexual act, a test to detect in such defendant the presence of the etiologic agent for acquired immune deficiency syndrome;

(B) to disclose the results of such test to such defendant and to the victim of such sexual act; and

(C) to provide to the victim of such sexual act counseling regarding HIV disease, HIV testing, in accordance with applicable law, and referral for appropriate health care and support services.

(3) For purposes of this subsection--

(A) the term "convicted" includes adjudicated under juvenile proceedings; and

(B) the term "sexual act" has the meaning given such term in subparagraph (A) or (B) of section 2245(1) of title 18, United States Code.

No. 01-1231

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CLERK

In The

Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Petitioners,

v.

JOHN DOE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTION PRESENTED

Whether Connecticut's sex offender registration scheme denied respondents due process in violation of the Fourteenth Amendment, under the test of *Paul v. Davis*, 424 U.S. 693 (1976), because it stigmatized respondents as sex offenders who pose a danger to public safety, plus imposed intrusive reporting obligations on threat of felony prosecution, and eliminated their state law remedies, without notice and an opportunity to be heard on whether they pose a danger to public safety.

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STATEMENT

1. *The Parties*

Respondent John Doe represents a class of plaintiffs certified by the district court under Federal Rule of Civil Procedure 23(b)(2). Pet. App. A67-A68. The class consists of "all persons who are subject to the registration and public disclosure requirements" of the Connecticut sex offender registration statute, Conn. Gen. Stat. §§ 54-250 *et seq.*, "without notice and an opportunity to be heard on the question of whether they are dangerous." Pet. App. A67.

Petitioners are the Connecticut Department of Public Safety, the Connecticut Office of Adult Probation, the Commissioner of Correction, and supervisory officials of those agencies, which are charged under the Connecticut statute with collecting the sex offender registration information, establishing and maintaining the sex offender registry, and posting the registry on the Internet. *Id.* at A6-A8.

2. *The Statutory Framework*

The Connecticut legislature originally enacted a sex offender registration statute in 1994 and, as petitioners have explained, since then "has incrementally taken steps in the interest of public safety to expand the registration and notification requirements of the original Act, and to make such registry information more readily available to the public, in order to permit the public to protect itself." Pet. C.A. Br. 1. Certain provisions of the statute also were enacted to comport with a federal statute that conditions the availability of designated federal funds on a state's establishing a sex offender registration system. *See* 42 U.S.C. § 14071 (1994 & Supp. V 1999) (the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act)). The Wetterling Act requires states to release "relevant information that is necessary to protect the public concerning a specific person required to register under" that statute. 42 U.S.C. § 14071(e)(2) (Supp. V 1999). It does not, however,

mandate the aspect of Connecticut's sex offender registration scheme challenged here: the publication of a sex offender registry that includes all persons, (their names, photographs, and current whereabouts), who have been convicted of any crime involving a sexual component or a minor victim, without any determination of whether those persons pose a danger to public safety.

The current version of the Connecticut statute was enacted in 1998 as "An Act Concerning the Registration of Sexual Offenders." 1998 Conn. Pub. Acts 111 (Reg. Sess.). The statute has been amended several times since, including after this suit was filed in February 1999. *See* 1999 Conn. Pub. Acts 183 (Reg. Sess.) (An Act Concerning the Registration of Sexual Offenders); 2001 Conn. Pub. Acts 211 (Reg. Sess.) (An Act Concerning Crime Victims); 2002 Conn. Pub. Acts 7, §§ 78-84 (Spec. Sess.) (An Act Concerning State Expenditures).

The Connecticut statute mandates that all persons convicted of certain offenses comply with various registration requirements, and that petitioner Department of Public Safety make the registry publicly available, including on the Internet. Conn. Gen. Stat. §§ 54-250 *et seq.* The statute also established a "Sexual Offender Registration Committee" to make recommendations about implementing the registration requirements. *Id.* § 54-259.

a. *Persons subject to registration and public disclosure requirements*

Registrants under the Connecticut statute include persons convicted of a wide variety of offenses. The statute identifies the following categories of persons by reference to the statutory provisions under which they were convicted, and states that such persons "shall" register.[1]

[1] The statute imposes the same registration and public disclosure requirements on individuals who have been found not guilty of one of the listed offenses by reason of mental disease or defect. *See* Pet. App. A2-A3 n.1. We follow the practice of the court of appeals and use the term "conviction" to include a "finding of not guilty by reason of mental disease or defect." *Id.* at A2-A3 n.1.

(Continued on following page)

(i) Nonviolent misdemeanors. Registration is required for any person who has been convicted of a "nonviolent sexual offense" and released into the community on or after October 1, 1998 (the effective date of the current registration statute). Conn. Gen. Stat. § 54-251(a). Nonviolent sexual offenses include all fourth degree sexual assaults, which are class A misdemeanors punishable by not more than one year in prison. *Id.* §§ 54-250(5); 53a-73a(a), (b); 53a-36(1). Fourth degree sexual assaults include, *inter alia*, intentional "sexual contact" with a minor under fifteen, a person unable to consent because of mental incapacity, or a person with whom the actor has a relationship of trust like a psychotherapist or teacher. *Id.* §§ 53a-73a(a)(1), (4), (5), (6). "Sexual contact" is defined as "any contact with the intimate parts" of another person for the purpose of "sexual gratification" of the actor or "for the purpose of degrading or humiliating" the other person. *Id.* § 53a-65(3); *see In re Mark R.*, 757 A.2d 636, 638-639 (Conn. 2000) ("sexual contact" includes "smacking" another person's buttocks in a school hallway, in front of several people, with the intent to degrade or humiliate the victim).

(ii) Crimes against a minor, including nonsexual crimes. Registration is required for any person convicted of a "criminal offense against a victim who is a minor" and released into the community on or after October 1, 1998. Conn. Gen. Stat. § 54-251(a). "Criminal offenses against a victim who is a minor" include violations of any of thirteen listed criminal statutes, and violations of any of seven other listed criminal statutes if the victim were under eighteen at the time of the offense. *Id.* §§ 54-250(2)(A), (B). The seven listed offenses against victims under eighteen generally do not involve a sexual component. *See, e.g., id.* §§ 53a-92 (kidnapping); 53a-95 (unlawful restraint). They

also include offenses ranging from violent felonies to the nonviolent Class B misdemeanor of public indecency, punishable by a term of imprisonment not to exceed six months. *Id.* §§ 53a-186; 53a-36(2); 54-250(2).

(iii) Sexually violent offenses. Any person convicted of a "sexually violent offense," and released into the community any time within the ten years prior to October 1, 1998 or thereafter, must register. Conn. Gen. Stat. § 54-252. A "sexually violent offense" is a violation of any of eight listed criminal statutes. *Id.* § 54-250(11). Those offenses include sexual assaults involving the use of threats or force, and kidnappings that a court finds were committed with the intent to sexually abuse the victim. *Id.* §§ 54-250(11) (referencing, *inter alia*, *id.* §§ 53a-70a (aggravated first degree sexual assault); 53a-92 (kidnapping)).

(iv) Persons required to register under the repealed registration statute. Any person "who has been subject to the registration requirements of [repealed] section 54-102r of the general statutes, revised to January 1, 1997, as amended by section 1 of public act 97-183" also must register under the current registration statute. Conn. Gen. Stat. § 54-252(b). Registration under now-repealed Section 54-102r was required for those persons convicted of one of seven listed criminal offenses, designated as "sexual assaults," and any crime committed in another jurisdiction if the essential elements were the same as any of the listed offenses. *Id.* § 54-102r(a) (1997).[2]

(v) Convictions in other jurisdictions. Registration also is required for any person convicted in another state,

[2] Respondent John Doe was convicted in 1994 of violating Conn. Gen. Stat. § 53a-71(a)(1) (1994). That offense is designated a "criminal offense against a victim who is a minor." *Id.* §§ 54-250(2); 54-251. Thus, petitioners err in asserting that Doe was convicted of a crime designated by Connecticut law as a "sexually violent offense." Pet. Br. 3.

federal, military or foreign court "of any crime, the essential elements of which are substantially the same as any of the crimes" defined as a "criminal offense against a victim who is a minor," "nonviolent sexual offense," or "sexually violent offense," if the person resides in Connecticut on or after October 1, 1998. Conn. Gen. Stat. §§ 54-253(a); 54-250(2), (5), (11). And registration is required for a person who is not a resident of Connecticut if the person is registered as a sex offender under the laws of another state and "regularly travels into or within" Connecticut or "temporarily resides" in the state, or is "employed," "carries on a vocation," or "is a student" in the state. *Id.* § 54-253(b); 2002 Conn. Pub. Acts 7, § 81 (Spec. Sess.). A nonresident who is registered as a sex offender and travels in Connecticut "on a recurring basis for periods of less than five days," must notify the Public Safety Commissioner of his temporary residence in the State. *Ibid.*

(vi) Discretionary registration for felonies committed for a sexual purpose. An additional category of persons, although not categorically mandated to register, "may be required" by a court to register. Conn. Gen. Stat. § 54-254(a). Those include persons convicted on or after October 1, 1998, of any felony committed for a purpose of engaging in "sexual contact" or intercourse with another person without that person's consent. *Id.* §§ 54-250(12); 54-254(a).

b. Registration upon release into the community

Registration generally must occur within three days of the registrant's "release[] into the community." Conn. Gen. Stat §§ 54-251(a); 54-252(a); 54-254(a). "Release[] into the community" includes a number of situations. A person must register when he is released by a court after conviction, a sentence of probation, or other sentence that does not result in any term of imprisonment, *id.* § 54-250(10)(A), or when he is released from prison to a halfway house or upon completion of the maximum term of a

sentence. *Id.* §§ 18-100c; 54-250(10)(B). Registration is also required when a person is released on parole, which occurs only if "(1) it appears from all available information * * * that there is reasonable probability that such inmate will live and remain at liberty without violating the law, and (2) such release is not incompatible with the welfare of society." *Id.* § 54-125a; *see id.* §§ 54-125 (same for prisoners serving indeterminate sentences); 54-250(10)(B).

Finally, registration is required when a person is released from "a hospital for mental illness or a facility for persons with mental retardation by the Psychiatric Security Review Board on conditional release pursuant to section 17a-588 or upon termination of commitment to the Psychiatric Security Review Board." *Id.* § 54-250(10)(C). A person committed following a finding of not guilty by reason of mental illness or defect (*see* note 1, *supra*), may obtain a "conditional release" from commitment only if the Psychiatric Security Review Board finds that the person has shown, by a preponderance of the evidence, that he "can be adequately controlled with available supervision and treatment on conditional release," and the Board prescribes "such conditions as are necessary to prevent the acquittee from constituting a danger to himself or others." *Id.* §§ 17a-584(2); 17a-580(9); 17a-596(f). In addition, a person can be completely discharged from a term of commitment only if he can show a court, by a preponderance of the evidence, that he "does not have psychiatric disabilities or is not mentally retarded to the extent that his discharge would constitute a danger to himself or others." *Id.* §§ 17a-593(f) & (g); 17a-580(11). In making that determination, a court is to consider "that its primary concern is the protection of society." *Id.* § 17a-593(g).

c. *Registration and public disclosure requirements*

(i) Every registrant must provide to the Commissioner of Public Safety his "name, identifying factors, criminal history record and residence address." Conn. Gen. Stat. §§ 54-251(a); 54-252(a); 54-254(a). "Identifying factors"

include fingerprints, a photograph, and a description of other identifying characteristics. *Id.* § 54-250(3). Each registrant must provide a blood sample to the Commissioner for DNA analysis. *Ibid.* In addition, registrants convicted of a sexually violent offense must provide "documentation of any treatment received for mental abnormality or personality disorder." *Id.* § 54-252(a). Any registrant who is "employed at, carries on a vocation at or is a student at a trade or professional institution or institution of higher learning" in Connecticut must notify the Commissioner of that status and any change in that status. 2002 Conn. Pub. Acts 7, §§ 79-82 (Spec. Sess.) (adding requirement under Conn. Gen. Stat. §§ 54-251 to 54-254). Nonresident registrants must provide the Commissioner with "locations visited on a recurring basis or resident address, if any, in the state, and residence address in such person's home state." Conn. Gen. Stat. § 54-253(b).

Registrants must report in writing, within five days, every change of address to the Commissioner. *Id.* §§ 54-251(a); 54-252(a); 54-254(a). If the registrant's new address is in another state, or if the registrant is employed by, carries on a vocation, or attends school in another state, he must notify the Commissioner, and must register with the appropriate agency in the other state if it has a registration requirement for such offenders. *Ibid.*; 2002 Conn. Pub. Acts 7, §§ 79-82 (Spec. Sess.). The Commissioner must verify the address of each registrant "every ninety days." 2002 Conn. Pub. Acts 7, § 84. The Commissioner must send a nonforwardable form to each registrant which the registrant must complete and return. Conn. Gen. Stat. § 54-257(c). If a registrant fails to return the form within ten days of mailing, the Department "shall" notify local law enforcement authorities who "shall" apply for an arrest warrant for violation of the registration requirements. *Ibid.*

Registrants must submit to the retaking of a photograph upon request of the Commissioner of Public Safety. *Id.* §§ 54-251(a); 54-252(a); 54-254(a). The Department of Public Safety is required to retake every registrant's photograph "at least once every five years." *Id.* § 54-257(d).

(ii) A person convicted of a sexually violent offense must register and report to the State for the rest of his life. Conn. Gen. Stat. § 54-252(a). A person convicted of a nonviolent sexual offense, a criminal offense against a victim who is a minor, or a felony committed for a sexual purpose, must register and report to the State for ten years. *Id.* §§ 54-251(a); 54-254(a). Any person in either of the first two groups who "has one or more prior convictions of any such offense," and any person convicted under § 53a-70(a)(2) (sexual intercourse with person under 13 years of age and actor is more than two years older), must register and report to the State for life. *Id.* § 54-251(a).

Any person who violates the registration provisions "shall be guilty of a class D felony," punishable by one to five years in prison. *Id.* §§ 54-251(e); 54-252(d); 54-253(c); 54-254(b); 53a-35a(7).

(iii) The Department of Public Safety must establish and maintain a registry of all persons required to register under the Connecticut statute. Conn. Gen. Stat. § 54-257(a). The Department must notify the local police department or state police troop having jurisdiction where the registrant resides and, in addition, the law enforcement agency with jurisdiction over an institution of higher education if a registrant is a student or employee there. *Ibid.*; 2002 Conn. Pub. Acts 7, § 84 (Spec. Sess.). The Department also must transmit all registration information to the Federal Bureau of Investigation for inclusion in a national database. Conn. Gen. Stat. § 54-257(a); 42 U.S.C. § 14072(j) (Supp. V 1999) (information disclosed to FBI is released only to local law enforcement).

The sex offender registry is a public record, available at the Department and local police stations. Conn. Gen. Stat. § 54-258(a)(1). In addition, the Department must "make registry information available to the public through the Internet." *Ibid.* Viewers gaining access to the registry on the Internet through the Department's homepage would first see the Department's "mission" statement declaring that the Department "provides a coordinated, integrated program for the protection of life and property

within this state. The Department of Public Safety is charged to prevent crime, apprehend criminals, enforce motor vehicle laws, investigate crimes and traffic accidents and perform other regulatory and safety functions to benefit all citizens of this and other states," and also provide various safety and emergency services. J.A. 92.

Beneath that mission statement, in large type, was a set of links to other webpages, one of which was labeled "Sex Offender Registry." J.A. 92. Choosing that link (by clicking on it with a computer mouse) displayed a webpage with the same title. J.A. 93. Directly beneath the page's title was a bolded link labeled "Search Database for Offenders." J.A. 93.[3] Selecting that link displayed a new page, entitled "Sex Offender Registry," containing a form that allowed one to view all offenders, or to search by last name, town name or zip code. J.A. 15 ¶ 18. Selecting the

[3] After the bolded link, the page continued for seven paragraphs of text (over 700 words) providing various information about the site. J.A. 93-96. The second sentence of the fifth paragraph initially stated that "[t]his information is made available for the purpose of protecting the public." Pet. App. A10; Resp. Local Rule 9(C)1 Stmt., Exh. F. Sometime after March 1999, the Department removed that sentence and inserted in its place a lengthy exposition, including the following: "This information is made available for the purpose of complying with Connecticut General Statutes § 54-250, *et seq.* * * *. The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual." Pet. App. A47-A48; J.A. 16 ¶ 21, 94-95. Although the Department subsequently made minor formatting changes to the page, the substance of the text was the same at the time the district court enjoined the registry's publication until respondents are given an opportunity to be heard. Pet. App. A48 n.14.

"Show Offenders" button yielded a direct link to another page entitled "Registered Sex Offender." Pet. App. A9; J.A. 15 ¶ 19. Under that label was displayed an individual registrant's name, current photograph, date of birth, current resident address, identifying information (including race, height, weight, scars or tattoos), registration date, the statutory citation to the offense of conviction and title of offense, and the date of conviction requiring registration. J.A. 15-16 ¶ 19, 56, 61.

The Department must, at least four times a year, issue notices to the media informing them of the availability and means of gaining access to the registry. Conn. Gen. Stat. § 54-258(a)(1); J.A. 97, 98 (media websites providing links to the sex offender registry website). Real estate agents and persons selling their homes also are required to inform prospective home buyers in writing that the Department "maintains a site on the Internet listing information about the residence address of persons required to register" under the statute. Conn. Gen. Stat. § 20-327b(d)(2)(G). In addition, any state agency, court, or law enforcement office "may, at its discretion, notify any government agency, private organization or individual of registration information" when it "believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration" under the statute. *Id.* § 54-258(a)(2). Whenever registry information is disseminated to the public, it must be accompanied by a warning that using the information to harass, injure, or commit a criminal act against a registrant is subject to criminal prosecution. *Id.* § 54-258a.

The Department of Public Safety has a procedure for a registrant to challenge the accuracy or completeness of registry information, but no state agency conducts any individualized assessment of the public safety threat posed by a registrant or has discretion to determine whether an individual must register. Pet. App. A47.

d. *Exemptions from, restrictions on, and suspension of registration and dissemination requirements*

A court is authorized in two instances to exempt some persons from the registration requirements. A person convicted of engaging in sexual intercourse with someone between thirteen and sixteen years of age by an actor who is more than two years older may be exempted, but only if the actor were under nineteen at the time of the offense. Conn. Gen. Stat. §§ 53a-71(a)(1); 54-251(b). A person convicted of subjecting another person to "sexual contact" without the other person's consent (which is one of the covered misdemeanors) also may be exempted. *Id.* §§ 53a-73a(a)(2); 54-251(c). In both instances, exemptions are conditioned on a court finding that "registration is not required for public safety." *Id.* § 54-251(b), (c).

The statute also provides that, in order to avoid revealing the identity of the victim in certain circumstances, a court may order, *sua sponte*, that the Department of Public Safety restrict the dissemination of a person's registration information only to law enforcement. *Id.* § 54-255(a), (b). A court first must find that making the information public "is not required for public safety." *Id.* § 54-255(a), (b). A court "shall remove" the restriction on dissemination if, "at any time," it finds that "public safety requires" that the information be made available to the public. *Id.* § 54-255(a), (b). Such a court-ordered restriction on dissemination is authorized only in cases involving a conviction for compelling a spouse or cohabitor to engage in sexual intercourse by use or threat of force; or a conviction for a nonviolent sexual offense, offense against a victim who is a minor, or a sexually violent offense, if the victim is under eighteen years of age and related to the person (within certain specified degrees of kindred). *Id.* §§ 53a-70b; 54-255(a), (b). If the court "at any time" finds that changed circumstances make publication of the registration information "no longer likely to reveal the

identity of the victim," the court must remove the restriction. *Id.* § 54-255(a), (b).

Courts also may consider petitions from certain persons, convicted before the year 2000, to restrict the dissemination of their registry information by providing it only to law enforcement. *Id.* § 54-255(c). A person convicted on or after July 1, 1999 (or October 1, 1998, in one instance), is not eligible to petition for a restriction. A restriction petition may be filed only by persons in five categories: (1) persons under nineteen at the time of the offense who were convicted, before July 1, 1999, of engaging in sexual intercourse with a person between the ages of thirteen and sixteen years if actor were more than two years older, *id.* § 53a-71(a)(1); (2) persons convicted, before July 1, 1999, of the misdemeanor of subjecting another person to sexual contact without that person's consent, *id.* § 53a-73a(a)(2); (3) persons convicted, before July 1, 1999, of a nonviolent sexual offense, an offense against a minor, or a sexually violent offense, where the victim was under eighteen years of age and related to the actor within specified degrees of kindred; (4) persons convicted, before July 1, 1999, of compelling a spouse or cohabitor to engage in sexual intercourse by use or threat of force, *id.* § 53a-70b; and (5) persons convicted, before October 1, 1998, of any crime requiring registration, if the person did not serve any time in jail or prison as a result of the conviction, has not subsequently been convicted of any crime requiring registration, and has registered with the Department as required. A court may grant such a petition only if it finds that dissemination of the registry information "is not required for public safety." *Id.* § 54-255(c).

The Department of Public Safety may suspend registration and reporting for a person who is incarcerated, civilly committed, or residing outside the State. *Id.* § 54-257(b). The Department may preclude public access to the person's registry information during the suspension period. *Ibid.*

e. *Governmental immunity from liability*

The State, its political subdivisions, and its officers and employees, may not be held civilly liable to a registrant for carrying out the Connecticut statute's registration and public disclosure provisions. Conn. Gen. Stat. § 54-258(b). The State and its political subdivisions are immune from civil liability for conduct in notifying an organization or individual of registration information, based on a good faith belief that notification is necessary to protect the public or an individual. *Ibid.* State officers and employees are immune from liability in such instances except in cases of wanton, reckless or malicious conduct. *Ibid.*

3. Proceedings Below

a. Respondent Doe, on behalf of himself and a class of similarly situated persons, filed this action against petitioners under 42 U.S.C. § 1983, seeking declaratory and injunctive relief. J.A. 112-133. Respondent alleged that the Connecticut sex offender registration scheme violated his and the class members' due process rights by stigmatizing them as currently dangerous sex offenders through the State's publicly disseminated "Sex Offender Registry," and altering their legal rights and status, without giving them prior notice and an opportunity to be heard on whether they pose a danger to public safety. *Id.* at 118-131. Respondent also alleged that the Connecticut statute imposed an additional punishment for past offenses in violation of the *Ex Post Facto* Clause, U.S. Const., Art. I, § 10. J.A. 131-132.

On March 31, 2001, on cross-motions for summary judgment, the district court held that the Connecticut sex offender registration scheme deprived respondent of his right to due process under the Fourteenth Amendment. Pet. App. A41-A57. The court rejected petitioners' claim that Connecticut's sex offender registry did no more than disseminate to the public "truthful and accurate information" about convicted sex offenders. Pet. App. A50-A53. The court held that the registry conveyed the stigmatizing

and, with respect to nondangerous registrants, false message that they were presently dangerous people from whom the public needs to protect itself. *Ibid.* The court explained that the Connecticut statute and registry's stated purpose of protecting the public, and the publication of current, identifying information about registrants and their whereabouts, intentionally broadcasted the message that nondangerous registrants are dangerous. *Ibid.*

Recognizing that "stigmatizing conduct must be accompanied by some tangible injury or material alteration of legal right or status" to warrant due process protection, the district court held that the Connecticut statute's registration obligations constitute such an alteration. *Id.* at A53 (citing *Paul v. Davis*, 424 U.S. 693 (1976)). The Connecticut statute "requires nondangerous registrants to take specific actions to facilitate the government's ongoing defamatory communications. This is no small matter." *Id.* at A56 "Because the registration requirements alter the offenders' status under state law, they satisfy the plus element," required under *Paul v. Davis*, for a constitutionally protected interest. *Ibid.* The court concluded that, because "it is undisputed that the [Connecticut statute] provides no procedure to determine a person's dangerousness before he is included in the registry[,]" "nondangerous registrants do not have an adequate opportunity to be heard before the deprivation of their liberty interest and thus are denied their Fourteenth Amendment right to due process." *Id.* at A57. The court rejected respondent Doe's *ex post facto* claim. *Id.* at A57-A66.

On May 18, 2001, the district court certified a plaintiff class, under Federal Rule of Civil Procedure 23(b)(2), of persons similarly situated to respondent Doe whose due process rights were violated by the Connecticut sex offender registration scheme. J.A. 5; Pet. App. A67-A68. The court then entered an order enjoining petitioners from "(1) disclos[ing] or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry

information concerning a member of the due process class if the information identifies the class member as being included in the Registry; and, (2) identifying any member of the due process class as being included in the Registry." *Id.* at A68. The court specified that "nothing in [the] order shall: "impair access to the Registry by law enforcement agencies and officers[;]" "preclude law enforcement agencies and officers * * * from using information contained in the Registry in specific criminal investigations and prosecutions, so long as [respondents] are not described to the public as being included in the Registry;" preclude law enforcement from "disclosing or disseminating to the public information necessary to protect the public concerning a specific person, so long as members of the due process class are not described to the public as being included in the Registry[;]" or "affect the public's ability to obtain individual criminal conviction history records" pursuant to applicable Connecticut statutes. *Id.* at A68-A69. The district court entered judgment for respondents on the due process claim and dismissed respondent's *ex post facto* claim. J.A. 207-208. The court denied petitioners' request for a stay of the injunction pending appeal. J.A. 5.

b. The court of appeals affirmed. Pet. App. A1-A40.[4] The court held that, because "the State [chose] these particular [offenders] about whom to disseminate information, a record as to their sex offenses, and information as to their current whereabouts," it "implies that each person listed [in the registry] is more likely than the average person to be currently dangerous." *Id.* at A18. "This implication stigmatizes every person listed on the registry." *Ibid.* Applying the test of *Paul v. Davis*, the court reasoned that the "extensive and onerous" registration

[4] The court of appeals also denied petitioners' request for a stay of the injunction pending appeal. J.A. 230-231.

obligations, which registrants must fulfill or face prosecution for a five year felony, altered the registrant's legal status and were "'governmental in nature,' * * * insofar as they could not be imposed by a private actor." *Id.* at A29-A30 (internal citation omitted). Those attributes distinguished respondents' due process claims "from a traditional defamation claim brought under state law." *Ibid.* The court concluded that, because public notification of registry information "without a hearing as to the current danger that the plaintiff (and other members of the class) poses, * * * is both central to the constitutional infirmity of the statute and the principal object of the injunction, the injunction is properly tailored to fit the nature and extent of the violation." *Id.* at A39.[5]

SUMMARY OF ARGUMENT

A. The State of Connecticut's sex offender registration scheme, *see* Conn. Gen. Stat. §§ 54-250 *et seq.*, stigmatized respondents as individuals who pose a danger to public safety. The registry did not include conviction information alone. It also listed each registrant's current home address, and a photograph that was updated regularly for at least ten years, and did so in the context of individually labeling each registrant a "Registered Sex Offender." The State published the registry on the Internet through its Department of Public Safety website, which declares that the Department's mission is to protect life and property and to prevent crime.

The State published the message that respondents were currently dangerous without having determined whether any of respondents, in fact, posed a danger to public safety. Moreover, the registry did not differentiate

[5] The court of appeals did not reach respondent Doe's individual cross-appeal on his *ex post facto* claim because of its affirmance of the judgment in favor of respondents on the due process claim. Pet. App. A38.

the listed offenders from one another in any way that would indicate varying levels of dangerousness; the registry did not even reflect the fact that many registrants were convicted of misdemeanors rather than felonies. The scheme mixed misdemeanants with felons, nonviolent offenders with violent ones, persons who committed sexual crimes with those whose offenses had no sexual component, persons who served substantial prison time with those who served none, offenders who received treatment with those who did not, and those convicted with those acquitted by reason of mental illness.

The stigmatizing message that respondents are currently dangerous is precisely the message that the State intended to convey. The legislative record makes clear that the statute was enacted as Connecticut's version of "Megan's Law," referring to a child victim of a sexual assault and murder by a recidivist sex offender. Such laws are intended to publicize the current whereabouts and appearances of offenders who are dangerous, especially to children. That is a much narrower category of offenders than those included in the Connecticut registry.

The statute's text, structure, and history confirm that the registration scheme was designed to identify for the public currently dangerous individuals. For example, the statute allows for certain exemptions (in extremely limited circumstances) which are expressly conditioned on a court finding that registration, or public dissemination of the registry information, "is not required for public safety." *See* Conn. Gen. Stat. §§ 54-251(b), (c); 54-255(a), (b), (c). The purported disclaimer that petitioners cite to justify the defamatory message of the registry does not, in fact, indicate that the registry includes individuals who are not dangerous. Moreover, it was far from prominently displayed, and, as a matter of law, could not eliminate the registry's defamatory message. The fact that each registrant was individually named and labeled defeats petitioners' attempt to recast the case as a group defamation claim.

B. Such a state-imposed stigma warrants procedural due process protections under *Paul v. Davis*, 424 U.S. 693 (1976), if it is in the course of state conduct that alters the legal rights or status of those stigmatized. The sex offender registration scheme imposes upon respondents burdensome registration and reporting requirements that are not imposed on other citizens, or even other offenders, and compels compliance through felony sanctions. Also, the statute eliminated respondents' causes of action against the State and its officials that could have redressed any injury that was caused by the State's publication of the registry information. Thus, respondents' rights and status were altered in significant ways by virtue of the sex offender registration scheme. The State's failure to provide notice and an opportunity to be heard before publishing the defamatory statements violated respondents' federal constitutional right to procedural due process.

C. Petitioners err in contending that compliance with the requirements of procedural due process is not feasible because determinations of dangerousness are problematic and unreliable. Petitioners' claim cannot be squared with the fact that the statute elsewhere requires courts to make just such determinations in assessing whether to grant exemptions. In addition, the Connecticut legislature requires state courts and agencies to assess future dangerousness in a variety of other contexts, including during parole hearings and proceedings for release from civil commitment. Moreover, numerous other states have sex offender registration schemes that require notice and an opportunity to be heard.

As petitioners acknowledge, the Wetterling Act, 42 U.S.C. § 14071, does not require public dissemination of every registrant's information. To the contrary, the Wetterling Act, which conditions certain federal funding on states having a sex offender registration scheme, also envisions individualized assessments regarding the likelihood of a person engaging in sexually violent offenses in certain circumstances.

D. Petitioners' *amici* suggest that the Court resolve the case on grounds of substantive due process, rather than procedural due process. Petitioners did not raise such a claim in their petition or in their opening brief on the merits. Neither the court nor the parties below addressed the claim. Petitioners thus have waived it. The Court should also decline to address the new claim because it would require the Court to address complex arguments in the first instance, including the level of constitutional review warranted where legislative classifications deprive individuals of their reputational interest. *Amici* also ignore the substantial over-inclusive and under-inclusive nature of the sex offender registration scheme, which undermines a claim that it could survive even rational basis review, absent some form of individualized assessment.

ARGUMENT

Connecticut has a compelling interest in protecting its residents, especially children, from crime. Recognizing that fact, the district court specified that nothing in its injunction shall impair: law enforcement's access to the sex offender registry; law enforcement's use of registry information in criminal investigations and prosecutions; or law enforcement's disclosure of information that is necessary to protect the public concerning a specific person. Pet. App. A68-A69. The district court also specified that the public would continue to have access to criminal conviction information as authorized under state law. *Id.* at A69. Thus, contrary to petitioners' repeated suggestions, *see, e.g.*, Pet. Br. 17, 22-23, this case is not about preventing the publication of truthful conviction information. Nor is it about avoiding the opprobrium attaching to a prior conviction, *see, e.g.*, Pet. Br. 23-24; that information already is publicly available. *See* Conn. Gen. Stat. § 54-142k(b).

This case is about petitioners publicly branding each respondent a "Registered Sex Offender" and tracking and publicly disclosing his current whereabouts and appearance via the Internet for at least a decade, thereby conveying the message to the public that he poses a continuing

danger to public safety. This case is about petitioners doing so while also altering respondents' legal rights and status, and without first affording them notice and an opportunity to be heard on whether they are currently dangerous.

THE CONNECTICUT SEX OFFENDER REGISTRATION SCHEME VIOLATED RESPONDENTS' PROCEDURAL DUE PROCESS RIGHTS UNDER *PAUL V. DAVIS* BECAUSE IT STIGMATIZED RESPONDENTS AS A DANGER TO PUBLIC SAFETY AND ALTERED THEIR LEGAL RIGHTS AND STATUS, WITHOUT PROVIDING NOTICE AND AN OPPORTUNITY TO BE HEARD ON WHETHER THEY POSE SUCH A DANGER

The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court considered the applicability of that protection in an action alleging that public officials had violated an individual's constitutional rights by defaming him.

As the *Paul* Court recognized, there is something particularly powerful about a defamation inflicted by the government acting as the sovereign: "[W]e have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts." 424 U.S. at 701. But to avoid making "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," the Court held that "reputation alone, apart from some more tangible interests," is not sufficient to "invoke the procedural protection of the Due Process Clause." *Ibid.* Such protection is warranted, however, where, "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711; *see also id.* at 708-709 ("alteration of legal status * * *, combined with the injury from [a state

imposed] defamation, justifie[s] the invocation of procedural safeguards"). Those requirements for alleging a constitutional injury to reputation are commonly referred to in the lower courts as the "stigma plus" test. Pet. App. A14-A15.

The Connecticut sex offender registration scheme meets both requirements. By mandating that respondents' names, current whereabouts and appearances be published in the Department of Public Safety's "Sex Offender Registry" and posted on the Internet for the purpose of protecting public safety, the scheme stigmatized respondents as currently dangerous. The registration scheme also altered respondents' legal status and rights by compelling them to provide certain personal information, (including their current whereabouts), on threat of felony prosecution, and by eliminating their state law causes of action against the State and its officials, such as defamation and invasion of privacy, that could have redressed an injury caused by the State's publication and dissemination of registry information.

A. Publishing Respondents' Current Whereabouts And Appearances, And Other Personal Information On The Sex Offender Registry Stigmatized Respondents As Currently Dangerous

1. The registry's content, and the context and manner in which it was published, demonstrates that the registry stigmatized respondents

To determine whether respondents suffer from a "'stigma' result[ing] from defamation by the government," *Paul*, 424 U.S. at 701, the Court must assess whether petitioners made a defamatory statement, that is, a statement that harms an individual's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13 (1990) (quoting *Restatement (Second) of Torts* § 559 (1977)).

It is not sufficient to insist, as petitioners do, that the sex offender registry could not be stigmatizing because it contains only information that is literally true. Pet. Br. 13, 15-24. The question is whether the relevant statements created a "defamatory impression," *Codd v. Velger*, 429 U.S. 624, 628 (1977), which can be achieved by "juxtapos[ing] a series of facts so as to imply a defamatory connection between them." *Toney v. WCCO Television*, 85 F.3d 383, 387 (8th Cir. 1996) (White, J., sitting by designation); *see Milkovich*, 497 U.S. at 20 n.7 (examining "defamatory facts implied by a statement"); *Restatement*, *supra*, § 565 cmt. b ("It is enough that the communication is reasonably capable of being understood as charging something defamatory."); 1 R. Smolla, *Law of Defamation* § 4:21, at 4-38.6 (2d ed. 1997) ("many courts * * * apply a healthy measure of common sense to find material actionable when the innuendo carried by the true facts is both apparent and clearly defamatory").[6] Petitioners concede as much by acknowledging that a communication that includes only "materially true facts" is nonetheless defamatory if "the particular manner or language in which the true facts are conveyed[] supplies additional, affirmative evidence suggesting that the defendant intends or endorses [a] defamatory inference." Pet. Br. 19-20 (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990)) (emphasis omitted).[7]

[6] Petitioners complain that respondents do not "point to any 'undisclosed facts' that would eliminate any purported implication of dangerousness." Pet. Br. 20. But such a showing is not required. *See* W. Page Keeton, *Prosser & Keeton on the Law of Torts* § 116, at 117 (5th ed. Supp. 1988). In any event, respondents have identified such "undisclosed facts;" the registry "does not provide sufficient information for members of the public to determine whether any particular person who appears on the registry poses a threat to public safety." J.A. 127 ¶ 69.

[7] This case does not implicate the First Amendment limitations on regulation of truthful speech involved in the media cases cited by petitioners. *See* Pet. Br. 22-23. The district court did not enjoin the publication of any individual's conviction information; that information

(Continued on following page)

To decide whether the statements made through the operation of Connecticut's statutory registration scheme were stigmatizing, it is necessary to examine (as did the courts below) the reasonable understanding of the recipients of the communication, as evidenced by the words used in light of the context in which they are made, the manner in which the communication was conveyed, and the intent of the speaker. *See Milkovich*, 497 U.S. at 16-17, 21; *Restatement*, *supra*, § 563 cmt. c-e.

a. *The language used to publish registry information, and the manner in which that information was presented, stigmatized respondents as a danger to public safety*

The language used by the Department of Public Safety to publish sex offender registry information, and the manner in which that information was displayed, demonstrate that the registry conveyed the message that registrants pose a danger to public safety.

First, each registrant's separate page on the Internet was accessible through the Connecticut Department of Public Safety's webpage entitled "Sex Offender Registry." J.A. 93. Each individual's page, with his name, picture and other identifying information, expressly labeled the person a "Registered Sex Offender" Pet. App. A9; J.A. 15-16 ¶ 19. The language selected by petitioners to convey their communications – "Sex Offender Registry" and "Registered Sex Offender" – is far from neutral. Those terms do not merely indicate that a person has been convicted of a crime involving sex. Sex offenders are viewed as "the scourge of modern America, the 'irredeemable monsters'

remains available to the public today. See pp. 30-31, *infra*. The injunction addressed the misleading message of current dangerousness conveyed by petitioners' publication of the sex offender registry in the course of altering respondents' legal rights and status.

who prey on the innocent." Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 88 J. Crim. L. Criminology 1167, 1167 (1999). The classification as a sex offender "implicitly announces that, in the eyes of the State, the plaintiff presents a risk of committing a sex offense." *Doe v. Attorney Gen.*, 686 N.E.2d 1007, 1013 (Mass. 1997).

Using the term "Registered" underscored the message that a registrant is currently dangerous. Compelling an offender to register his whereabouts with the State on an ongoing basis, and promptly publishing that information, announced to the world that the State believed that the offender needed to be watched. *Cf. Restatement*, *supra*, § 568 cmt. d, illus. 1 (notorious "shadowing" of person in public can be defamatory).[8] A viewer's understanding of the nature of the Department of Public Safety's interest in the listed offenders was informed by the prominently displayed "mission" statement that appeared before the Internet user reached the "Sex Offender Registry" link. That statement announced that the Department "provides a coordinated, integrated program for the protection of life and property within this state" and "is charged to prevent crime, apprehend criminals, * * * and perform other regulatory and safety functions." J.A. 92.

[8] Petitioners acknowledge that publishing each registrant's current address was part of the statement's "context," but then suggest that it was included to reduce the number of persons who viewed any individual's registry page. Pet. Br. 21 n.16. But the number of persons exposed to the information does not alter the effect on the viewer created by posting a current address (along with the other personal information) under the title "Registered Sex Offender." Moreover, to the extent that petitioners suggest the site was designed to "preclud[e] persons" from viewing the page of any registrant not in their "proximity," *ibid.*, that is innacurate. The registry was available to any Internet user, regardless of location, as petitioners elsewhere acknowledge. Pet. Br. 7; J.A. 15 ¶ 8, 109 ¶ 8.

When the registry was first posted on the Internet, the Department was candid with the public about the registry's purpose. The "Sex Offender Registry" page stated: "This information is made available for the purpose of protecting the public." Pet. App. A10. That language was removed after this litigation began, and replaced with a longer description of the purpose. *Id.* at A48. Petitioners now describe that new language as a "disclaimer" and argue that it repudiated any message conveyed about registrants posing a danger to public safety. Pet. Br. 17-19. But that language appeared far below the highlighted link one would select to gain access to the registry database, J.A. 93, so an Internet user was most likely to go straight to the registrants' personal information without reading those later paragraphs.

Moreover, the language followed four paragraphs discussing a long list of other issues related to the registry. It was not until the middle of the fifth paragraph that the registry stated that the Department had not "considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion on the registry, and has made no determination that any individual included in the Registry is currently dangerous." *Id.* at 95. The user also was informed that the registrants were listed "by virtue of their conviction record and state law" and that the "main purpose" of the data was to make the information accessible, "not to warn about any specific individual." *Ibid.*[9]

[9] Petitioners contend that the language was "prominently displayed on the initial screen." Pet. Br. 8. To the extent petitioners suggest that a person viewing that page on a computer would perceive the statements they rely upon as prominent, that contention cannot be sustained. The webpage as it then existed can be viewed on the website of a non-profit organization that regularly archives the Internet. *See* web.archive.org/19990508/http://www.state.ct.us/dps/sor.htm. It confirms that the language so critical to petitioners was anything but prominently displayed.

That purported "disclaimer" never informed the Internet user that the registry included offenders who did not pose a danger to public safety. In any event, even if the Department had added a meaningful disclaimer to the website that would actually be read by the user, the registry's defamatory message would not have been eliminated. *See Restatement*, *supra*, § 571 cmt. c ("If the imputation is sufficiently made, the defamer is liable although he expresses his own doubt as to the truth of the charge or even if he expressly states his disbelief in it."); *id.* § 563 cmt. c ("A conditional or alternative statement may be defamatory if, notwithstanding its conditional or alternative form it is reasonably understood in a defamatory sense.").

b. *The statutory framework created a defamatory context for publication of registry information*

The context surrounding the publication of respondents' registry information, as directed by the statutory text and structure, *see* Conn. Gen. Stat. §§ 54-250 *et seq.*, demonstrates that the registration scheme did, and was intended to, transmit the message that registrants pose a danger to public safety. As the Supreme Court of Connecticut has explained, the Connecticut sex offender registration statute was enacted to "protect the public from sex offenders." *State v. Kelly*, 770 A.2d 908, 954 (Conn. 2001).

The registry did not, contrary to petitioners' claim, simply publish truthful information about convictions. Pet. Br. 17, 20 n.15, 23-24. The statute requires that a registrant submit, and the Department of Public Safety publish on the Internet, not only the individual's criminal conviction, but also his current residential address and appearance. *See* pp. 6-7, *supra*. The current whereabouts and appearance of a previously convicted person who has completed his criminal sentence is not part of a conviction or criminal history record. *See* C.A. July 12, 2001, Oral Arg. Tr. 2-3 (State Attorney General acknowledging that

"[s]ome of [the registry] information would not be obtainable but for the [sex offender registration] statute").

The sex offender registry did not convey the same information or message as does conviction information. In Connecticut, "conviction information" is limited to information that "discloses that a person has pleaded guilty or nolo contendere to, or was convicted of, any criminal offense, and the terms of the sentence." Conn. Gen. Stat. § 54-142g(c). Connecticut law dictates that "[c]onviction information shall be available to the public for any purpose." *Id.* § 54-142k(b); *cf. id.* § 54-142g (defining broader categories of criminal history record information that are not publicly available). Conviction information tells the public that a particular person was convicted of a particular crime or crimes in the past, and was punished by service of the listed sentence. By contrast, the sex offender registry, by publishing information about a previously convicted person's *current* whereabouts and appearance, told the public that a registrant was *currently* dangerous and that his current whereabouts should be widely known. *See id.* § 20-327b(d)(2)(G) (requiring that prospective home buyers be informed in writing by sellers that the Department of Public Safety "maintains a site on the Internet listing information about the residence address of persons required to register").

The registry did not include types of information typically seen in conviction information that helps a viewer discern the comparative severity of convictions, such as the length of the sentence imposed and whether the offense were a misdemeanor or a felony. *See* Pet. App. A52 (registry provides "neither absolute nor relative information regarding the dangerousness" of any particular registrant). The statute also separates respondents from all other persons previously convicted of other crimes, even violent ones. Despite its avowed public safety goals, the State has not deemed the current appearances and whereabouts of other violent offenders to be information the public needs to

know. And the statute allows for suspension of registration and the dissemination of registry information whenever an offender is reincarcerated, civilly committed, or residing out of state. *See* Conn. Gen. Stat. § 54-257(b). The message is clear: the public needs to be told about those who the State believes are dangerous only when those persons are in the community.

The statute's requirement that the Department of Public Safety notify "all print and electronic media in the state," at least four times a year, about how to gain access to the registry, *see id.* § 54-258(a)(1), confirms that the registry sent a message about current dangerousness, not past conduct. If the purpose of the registry were to provide the public registrants' past conviction information, a current address and photograph would be irrelevant, and there would be no need to remind the public repeatedly of the registry's availability.

Finally, the statute's allowance for offenders to be exempt from registration in certain circumstances, and for restriction on public dissemination of registry information in other circumstances, *see* pp. 11-12, *supra*, reinforces the intended message that the individuals about whom registry information is published are currently dangerous. The exemptions and restrictions on public dissemination of registry information all are conditioned on a court finding that registration or public dissemination, as the case may be, "is not required for public safety." *Id.* §§ 54-251(b), (c); 54-255(a), (b), (c). Here again, the statute says that those on the registry were put there to protect against the danger they pose to public safety.

c. *The State intended that the registry convey the message that registrants are currently dangerous*

The circumstances surrounding the enactment of the Connecticut sex offender registration statute confirm the above analysis. As petitioners acknowledge, the statute

was enacted as Connecticut's "Megan's Law," "referring to Megan Kanka, a 7-year old raped and murdered by her neighbor." Pet. Br. 12-13; *see also* Pet. App. A4 & n.4; J.A. 210 (petitioners identifying statute as "our law known commonly as our Megan's Law"). The very name conjures images of violent, recidivist child molesters (a much narrower category of offenders than is included in Connecticut's sex offender registry). Like the original Megan's Law, which was enacted in New Jersey "'to identify potential recidivists and alert the public when necessary for the public safety,'" (Pet. App. A4 n.4 (quoting *Paul v. Farmer*, 227 F.3d 98, 99 (3d Cir. 2000)), the "avowed" purpose of the Connecticut statute is to "disclos[e] the identity of persons who are currently a threat to public safety." Pet. App. A17.

The Connecticut lawmakers sponsoring the bill made clear that they intended the registry to convey the message that registrants pose a danger to public safety. Legislators explained, for example, that the law's purpose was to "provide a data base to law enforcement officials and to citizens as a whole containing the names of sexual offenders who are, in fact, predators and in particular, sexual offenders who tend to victimize young children." Resp. Local Rule 9(C)1 Stmt. (*see* J.A. 21), Exh. L at 55 (statement of Rep. Lawlor); *id.* Exh. M at 342-343 (Rep. Amann) ("What we're going after are * * * the ones who are going to feed on the sexual gratification and possibly harming or the murder of a child"); *id.* at 313 (Rep. Farr) ("I think because of Megan's law we now recognize that there are dangerous people within the community.").

The statements and conduct of petitioners themselves, who are state agencies charged with implementing the registry requirements, undermine their argument that the registration scheme did not stigmatize respondents. When the district court enjoined publication of the registry, petitioners sought to stay the injunction, even though the

injunction left law enforcement use of the registry information unchanged. At oral argument on their stay request, the state Attorney General argued that the injunction caused "very dramatic and drastic harm, ongoing harm, to the State," citing the "very high recidivism rate that characterizes this group of offenders and poses an ongoing danger to the state's citizens." J.A. 210; *see also id.* at 230 (Attorney General further arguing that registry should continue to be available "so that public safety may be served"); Pet. C.A. Motion to Stay 24 ("prohibiting public disclosure of registry information will have a detrimental effect on public safety"). Even as recently as their brief on the merits in the court of appeals, petitioners expressly declared that the Connecticut sex offender registration statute is intended to "make * * * registry information more readily available to the public[] in order to permit the public to protect itself." Pet. C.A. Br. 1.

In sum, the language used in, and the stated purpose behind, Connecticut's sex offender registration scheme vitiates petitioners' claim that the registry did not stigmatize respondents. If public safety were served by publishing updated information about what respondents look like and where they live, as petitioners urged so forcefully below, *e.g.*, J.A. 210, that would be only because respondents are currently dangerous, something petitioners have not determined to be true. The State's public defamation of respondents as "Registered Sex Offenders" stigmatized them as currently dangerous offenders who threaten the safety of the public.

2. Petitioners are incorrect that the injunction limits release of conviction information, and that the defamatory registry is justified because respondents' individual information was posted as part of a group

a. The district court's injunction does not restrict public access to conviction information. Conviction

information was accessible to the public under state law before the sex offender registration scheme was adopted, Conn. Gen. Stat. § 54-142k, and remains so today. The injunction does not "affect the public's ability to obtain individual criminal conviction history records," which includes conviction information. Pet. App. A69. Indeed, the injunction does not preclude law enforcement officials from publicly disseminating information necessary to protect the public concerning a particular individual, "so long as members of the due process class are not described to the public as being included in the [r]egistry." *Ibid.*

Petitioners attempt to justify the stigmatizing nature of the sex offender registration scheme by suggesting that respondents challenge the publication of the fact of their prior convictions as the stigmatizing communication. Pet. Br. 22-24. They claim that the message that respondents pose a danger to public safety arises from the fact of those convictions, not from the message communicated through the registration scheme. They argue that the case is about respondents' attempt to avoid the opprobrium attached to those convictions. Pet. Br. 23-24; *see also* U.S. *Amicus* Br. 21. But the registry did not simply provide access to conviction information; it published a registrant's current appearance and whereabouts and labeled him currently dangerous.

Furthermore, although respondents do suffer opprobrium because of their convictions, the degree suffered varies widely depending on the nature of the conviction. Misdemeanants certainly do not suffer the same opprobrium as convicted felons. And, notwithstanding the fact that a registrant may be known as a convicted felon, he still has an interest in not being labeled currently dangerous. *Cf. Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (Scalia, J.) ("It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity. * * * Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential."), *vacated and remanded on other grounds*, 477 U.S. 242 (1986);

Sibron v. New York, 392 U.S. 40, 56 (1968) ("It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable.").

b. Petitioners and their *amici* also claim that, because respondents were all convicted of the criminal offenses that required them to register, their due process claims fail because each respondent "received any process that he was due when he was convicted" of that offense. U.S. *Amicus* Br. 17-23; *see* Pet. Br. 34. But a criminal proceeding typically does not address whether a convicted defendant will be a continuing danger to public safety after his sentence is completed. And the fact that a criminal defendant receives constitutionally required due process during the prosecution that led to his conviction does not give the State license to single him out, after he has served his criminal sentence, and deprive him of a constitutionally protected liberty or property interest without affording him procedural due process.

c. Petitioners argue that, because they labeled more than 2000 individuals as "Registered Sex Offenders," any defamatory statement of dangerousness applied only to the group as a whole. Pet. Br. 27-30. It is true that in determining whether a defamatory statement made about a group gives rise to liability to individual members of the group, the size of the group is an important factor. *See Restatement*, *supra*, § 564a. That doctrine applies, however, only in cases like those cited by petitioners, where a defamatory statement was made about a large group and no individual was personally named, so that the communication would not be understood to refer to any particular person. *See* Pet. Br. 27-30. Here, by contrast, each respondent was specifically named on the registry on a separate page (which could be located by entering the individual's name) under the label "Registered Sex Offender," in a context and manner, and with an intent, that conveyed the message that the individual presented a current danger to public safety.

B. The Connecticut Sex Offender Registration Scheme Alters Respondents' Legal Rights And Status

The Connecticut sex offender registration scheme does more than stigmatize respondents. It alters their legal rights and status so that the constitutional protections of procedural due process apply under *Paul v. Davis*, 424 U.S. 693. The registration scheme does that in two ways. First, the law compels a respondent to register and report his current residential address and provide a photograph and other details about his current physical appearance for publication by the State as a registered sex offender. It imposes those registration and reporting requirements on threat of felony prosecution for noncompliance. Second, the registration scheme eliminates a respondent's state law causes of action, such as defamation and invasion of privacy, that could hold the State or its officials liable for an injury caused by the registry's publication.

1. Requiring respondents to report their current whereabouts and appearances to the State, on pain of felony prosecution, alters respondents' legal rights and status

Connecticut does not require members of its general populace to keep it apprised of their current whereabouts by verifying their address every ninety days. Nor does Connecticut insist that its inhabitants inform it if they enroll at a private college. Nor does Connecticut demand that its citizenry submit to photographs or supply DNA samples and fingerprints. In Connecticut, as in any free society, the government does not unilaterally demand those things of its citizens. *Cf. Brown v. Texas*, 443 U.S. 47 (1979) (absent reasonable suspicion of criminal conduct,

individuals cannot be criminally punished for refusing to provide name and address).[10]

Respondents, unlike the general populace (including those who were once convicted of an offense, but have completed any parole or probation terms), are subject to those very registration and reporting obligations upon threat of felony prosecution. *See* pp. 6-8, *supra*. Imposing felony sanctions on respondents for not providing such information alters their legal rights and status compared to other Connecticut residents, who are free to move and enroll in school without notifying the State. The court of appeals correctly concluded that, "imposition on a person of a new set of legal duties that, if disregarded, subject him or her to felony prosecution, constitutes a 'change of [that person's] status' under state law." Pet. App. A31 (quoting *Paul*, 424 U.S. at 712).

Petitioners suggest that the registration scheme does not alter a respondent's legal rights or status because, unlike the suspension from school for less than ten days, *Goss v. Lopez*, 419 U.S. 565 (1975), or loss of a tax exemption, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), registration does not extinguish a right

[10] Although most states require drivers to provide a residential address and photograph to be licensed, an individual can elect not to drive and dissemination of that information to the public is strictly limited by federal law. *See Reno v. Condon*, 528 U.S. 141, 143-145 (2000). And the national decennial census's request for personal information is attended by unprecedented confidentiality requirements. We are aware of no state that has required all of its residents to report when they move residences. In suggesting to the contrary, petitioners point to two cases in which courts held that individuals could not excuse their delay in filing lawsuits on the ground that they did not receive notice of government agency decisions on their claims because they failed to tell the agencies they had moved. *See* Pet. Br. 40 (citing *Tadros v. Commissioner*, 763 F.2d 89 (2d Cir. 1985) and *St. Louis v. Alverno College*, 744 F.2d 1314 (7th Cir. 1984)). The obligation to tell an agency of a change in mailing address during the course of a dispute is distinct from this case where the registrants have not invoked or sought a benefit from the state's legal process.

created by statute or regulation. Pet. Br. 39-42. But the Court's cases applying this legal doctrine have not been limited to statutory or regulatory rights. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972) (at-will employment).

Registration under a sex offender statute is "a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government." *Doe v. Attorney Gen.*, 686 N.E.2d at 1016 (Fried, J., concurring). The burden of registration is all the greater when a felony sanction can be imposed. For example, whenever a registrant fails to return an address verification card within ten days, he is subject to felony prosecution, even if he were required to register because of a misdemeanor conviction. *See* Conn. Gen. Stat. § 54-257(c); *see also* 2002 Conn. Pub. Acts 7, § 84 (Spec. Sess.) (registrants must verify their residential addresses every ninety days).

Petitioners claim that the foregoing change in legal rights and status does not meet a causation requirement that petitioners read into *Paul v. Davis*. *See* Pet. Br. 35-37. Petitioners' reading of *Paul* is inconsistent with the reasoning in that opinion, which is based not on tort principles like causation, but on injury to reputation, occurring in the course of a change in legal rights or status, as a means of distinguishing a constitutionally protected liberty or property interest from those interests that are left to state defamation law. *Cf. Albright v. Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, J., joined by Thomas, J., concurring in judgment) (explaining that the Court's varied holdings regarding redress for injuries caused by state actors were designed "to respect[ ] the delicate balance between state and federal courts").

The *Paul* Court's analysis of *Roth*, *supra*, also undermines petitioners' causation theory. In *Roth*, a state university failed to renew an employee's contract and the

Court concluded that the employee had no property interest in his job warranting due process protections. The *Paul* Court explained that the employee in *Roth* did not allege that, in declining to rehire him, the state imposed upon him a stigma or other disability that diminished his standing in the community or foreclosed other employment opportunities. *Paul*, 424 U.S. at 709-710. The Court recognized that, had there been a government action defaming the employee, he would have been "entitle[d] * * * to notice and an opportunity to be heard as to the defamation" if "the governmental action defaming [him]" had occurred "in the course of declining to rehire him." *Id.* at 709. The government-imposed defamation need not have caused the job termination, but could have been "in the course of" the termination.

Similarly, in *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court relied on *Paul* and *Roth* to hold that even though a decision to terminate an employee had been made by a public official before a defamatory statement was released to the public, the employee was "deprived of a protected 'liberty' interest" because, "even if [the statements] did not in point of fact 'cause' petitioner's discharge, the defamatory and stigmatizing charges certainly '[occurred] in the course of' the termination of employment." *Id.* at 633 n.13. Here, the information conveyed in the stigmatizing message was "obtained by means of the registration requirement." Pet. App. A34. Petitioners conceded that some of the information that the State disseminates to the public on the registry "would not be obtainable but for the statute." C.A. July 12, 2001, Oral Arg. Tr. 2-3. It is clear that the state-imposed stigma from the registry's publication occurred "in the course of" the state-imposed "plus" of registration and reporting. No more is required to warrant due process protections.[11]

[11] The obligation that a person continually submit and verify personal information to the government that the government then uses

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2. Eliminating respondents' state law causes of action against Connecticut and its officials for injuries caused by publication of registry information alters respondents' legal rights and status

Connecticut's sex offender registration scheme also alters respondents' legal rights and status by eliminating respondents' recourse against the State or its officials for any injury that they may cause by the publication and dissemination of registry information.[12] Like all states, Connecticut tort law provides for individual redress for injuries to reputation. *See Paul*, 424 U.S. at 699. Moreover, Connecticut law generally permits such tort suits to be brought against the State itself (once certain preconditions are met), as well as against state actors in their official and individual capacities. *See Shay v. Rossi*, 749

to stigmatize that person distinguishes this case from *Paul*, petitioners' assertions notwithstanding. *See* Pet. Br. 34; U.S. *Amicus* Br. 18. In *Paul*, the government compiled and distributed a list of names of "active shoplifters" based on information it collected from them at the time of an arrest based on probable cause. There was no suggestion in *Paul* that any of the information released was obtained through compulsory reporting. *See Paul*, 424 U.S. at 706 n.4 (distinguishing *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969), which held that due process requirements were triggered by action of fact-finding commission created for sole purpose of "brand[ing]" individuals "as criminals in public"). Of course, state-imposed stigmas that do not occur in the course of the alteration of a right or status do not require due process under *Paul*. Thus, the states are free to notify the public regarding arrests, to publicize the names of at-large fugitives, or to announce the names of persons wanted for questioning in connection with a criminal investigation.

[12] Respondents' arguments below focused on the registration scheme's imposition of the registration and reporting requirements, but the elimination of respondents' cause of action also satisfies the *Paul* test for establishing the alteration of a legal right or status under state law and, thus, can also be relied upon by the Court to affirm the judgment. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

A.2d 1147, 1165-1166, 1172 (Conn. 2000); *see also Chotkowski v. Connecticut*, 690 A.2d 368, 381-383 (Conn. 1997) (Berdon, J., concurring in part and dissenting in part) (tracing history of sovereign immunity in Connecticut).

The Connecticut sex offender registration scheme denies registrants (and only registrants) access to the foregoing state law remedies. The State, its political subdivisions, and its officials shall not be "held civilly liable" to a registrant based on "disclosure of any information regarding the registrant that is released or disclosed in accordance" with the statutory requirement that the Department of Public Safety make the registry accessible to the public and available through the Internet. Conn. Gen. Stat. § 54-258(b). The registration scheme eliminates any state law cause of action, such as defamation or invasion of privacy, that would provide a respondent equitable or legal redress against public officials for any injuries caused by the State's publication of the registry.

It cannot be disputed that eliminating such state law causes of action altered respondents' rights under state law.[13] It is true that a state may normally grant immunity

[13] It is not necessary to show that an individual would have prevailed absent the immunity; simply being deprived of the opportunity to prevail is sufficient to constitute a deprivation of a state-recognized right. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-429 & n.5 (1981). But here it is beyond dispute that many colorable civil claims by respondents on the registry were extinguished by the Connecticut statute's abolition of state civil liability. *See, e.g., Matos v. AFSCME*, No. CV980578747, 2001 WL 1044632, at *6, *8-*9 (Conn. Super. Aug. 13, 2001) (finding that defendants' literally true statement on their website that they were "investigating" a complaint that plaintiff misused funds was libelous because the statement, in context, "conveyed a defamatory implication"); *Director v. Freedom of Information Comm'n*, 775 A.2d 981, 989 n.11, 992-993 (Conn. 2001) (ruling that, under the State Freedom of Information Act (which adopted the definition of the state law tort action for invasion of personal privacy for the statutory personal privacy exemption), individuals, "who through

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to itself and its officers without offending due process, *Martinez v. California*, 444 U.S. 277 (1980), but that does not mean that granting such immunity against only one discrete group of individuals does not alter those individuals' legal rights. A state may also fire an at-will employee without offending due process, yet *Paul* and *Owen* both recognized that a legal status or right in such government employment could trigger procedural due process protections in connection with a state-imposed stigma, even if the status or right alone did not rise to the level of a constitutionally protected liberty or property interest.[14]

C. Providing Notice And An Opportunity To Be Heard Is Feasible And Consistent With The Wetterling Act

1. Individualized assessments of dangerousness are feasible and common

Petitioners suggest that providing notice and an opportunity to be heard to determine whether an individual poses a danger to public safety before publicly declaring that he does, is not feasible because such assessments are "largely problematic" if not "wholly unreliable." Pet.

significant efforts, have made a conscious attempt to insulate their addresses from the public domain," may claim an invasion of privacy).

[14] In light of that fact, petitioners' challenge to the limitation of the district court's injunction that prohibits the defamatory conduct but not the registration obligation (Pet. Br. 38; *see* U.S. *Amicus* Br. 16-17 & n.5) is misplaced. *Cf. Codd v. Velger*, 429 U.S. 624, 627-628 (1977) ("the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name;'" it does not include "a determination of whether or not * * * the employee was properly refused re-employment"); *Paul*, 424 U.S. at 709 (explaining that *Roth* "recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation").

Br. 24-26. Petitioners' claims cannot be squared with the Connecticut legislature's decision to require state courts and agencies to engage in precisely such determinations in a variety of settings. Indeed, the Connecticut sex offender registration statute itself provides that certain individuals can, in very limited circumstances, be exempt from registration and reporting, or can have public dissemination of their registry information restricted, if a court finds that the registration or the dissemination "is not required for public safety." Conn. Gen. Stat. §§ 54-251(b), (c); 54-255(a), (b), (c); *see* pp. 11-12, *supra* (detailing limited availability of exemptions and restrictions).

Connecticut law relies on similar findings in determining when individuals (including those convicted of sex offenses) can be released into the community. The parole board may release an inmate only if it determines that "there is reasonable probability that such [parolee] will live and remain at liberty without violating the law." *Id.* §§ 54-125; 54-125a. Similarly, the Psychiatric Security Review Board may grant conditional release and a court may completely discharge a person who is committed to a mental hospital, including those committed after being acquitted by reason of mental disease or defect, only if the board or court determines that the person would not "constitute a danger to himself or others." *Id.* §§ 17a-584(2); 17a-593(f); 17a-580(9) & (11). There are respondents who have been found by the State in such proceedings not to pose a danger to others, but who still must register and be publicly stigmatized as "Registered Sex Offenders."

In addition, the federal Wetterling Act normally requires a state to make an individualized assessment of future dangerousness (using a board of experts) in determining whether the state can designate a person as a "sexually violent predator." 42 U.S.C. § 14071(a)(2)(A) (Supp. V 1999). That term means (based on a series of statutory definitions): a person convicted of a sexually violent offense who suffers a "congenital or acquired condition * * * that predisposes that person to the commission of criminal sexual acts to a degree that makes the

person a menace to the health and safety of other persons," if that condition "makes the person likely to engage" in "sexually violent offenses" that are "directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization." *Id.* § 14071(a)(2)(A), (a)(3)(C), (a)(3)(D) & (a)(3)(E) (1994 & Supp. V 1999).

The designation "sexually violent predator" under the Wetterling Act triggers special requirements regarding the length and conditions of registration. *See id.* § 14071(b)(1)(B) (Supp. V 1999) (must provide documentation of medical treatment), (b)(3)(B) (must verify address every 90 days), (b)(6)(B)(iii) (Supp. V 1999) (must register for life). According to one of petitioners' *amici*, Connecticut obtained a waiver from the federal government to avoid performing those individualized assessments. *See* District of Columbia and 35 States *Amicus* Br. 12 n.8; *cf.* Pet. Br. 6 n.8. Connecticut does not use individualized assessments to impose those harsher requirements on sexually violent predators; instead, Connecticut treats everyone convicted of a sexually violent offense as if they had been designated a predator.

According to the United States, the "Megan's laws" in more than half the states have not adopted Connecticut's categorical notification approach. *See* Brief for the United States as *Amicus Curiae* in *Godfrey v. Doe*, No. 01-729, App. A (listing twenty-six states that have declined to rely on "[c]ategorical [d]isclosure of [o]ffenders"); *see also* U.S. *Amicus* Br. 27-28 n.11 (listing twenty-one states that have adopted an approach similar to Connecticut's). As described in the *amicus* brief of the Office of the Public Defender for the State of New Jersey, *et al.*, that majority of states have elected to use a variety of different approaches in their sex offender registry schemes to assess risk: some require notice and an opportunity to be heard on the question of dangerousness for every registrant; others limit the right to be heard, but also limit public disclosure of registration information to those who have been determined to pose a safety risk after notice and an opportunity to be heard. *See* Office of the Public Defender

of NJ *Amicus* Br. There is no indication that those states have had problems in administering such systems.[15]

That it is feasible to assess whether an individual poses a danger to public safety is consistent with the Court's decisions, which indicate that "there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention * * * 'that it is impossible to predict future behavior and that the question is so vague as to be meaningless.'" *Schall v. Martin*, 467 U.S. 253, 278-279 (1984) (quoting *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (footnote omitted)); *accord Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding constitutionality of state statute that authorizes civil commitment of a person who "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence"); *United States v. Salerno*, 481 U.S. 739 (1987) (upholding constitutionality of federal law that permits a court to deny bail to an individual if the court determines the individual may "pose a danger to any other person or the community").

2. Individualized assessments of dangerousness are consistent with the Wetterling Act

State sex offender registration systems that condition publication of registry information on dangerousness assessments are entirely consistent with the Wetterling

[15] Connecticut declines to respect the legislative judgments of other states that their own residents can be adequately categorized without endangering public safety. A registrant from a State (such as New Jersey or West Virginia), where the public dissemination of the person's sex offender registry information is not required because the state determined that he did not pose a danger to public safety, would, nonetheless, have his sex offender registry information disseminated on Connecticut's Internet registry. *See* Conn. Gen. Stat. § 54-253(b); 2002 Conn. Pub. Acts 7, § 81 (Spec. Sess.).

Act. The Wetterling Act provides that states that do not enact sex offender registration and public notification laws are ineligible for ten percent of a federal formula grant that they otherwise would receive. 42 U.S.C. § 14071(g)(2)(A) (Supp. V 1999). To be eligible for the full amount of the grant, each state must require registration, for periods of time ranging from ten years to life, by persons convicted of certain designated offenses. *Id.* § 14071(a)(1) (Supp. V 1999). From that registration information, states must only release "relevant information that is necessary to protect the public concerning a specific person required to register under this section." *Id.* § 14071(e)(2) (Supp. V 1999). As both petitioners and the United States acknowledge, compliance with the Wetterling Act does not require public dissemination of the name of every registered offender. Pet. Br. 4; U.S. *Amicus* Br. 5. Instead, compliance can be achieved (as many states have done) by using an individualized assessment to determine whether releasing information about a specific offender is "necessary to protect the public." *See also* 64 Fed. Reg. 582 (1999).

Petitioners and the United States err in suggesting that the Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (2000), alters that regime. *See* Pet. Br. 5 n.5; U.S. *Amicus* Br. 4-5. That Act simply amends the Wetterling Act to condition federal funds on a state requiring registrants to report whether they attend or work at any higher education institution, entering that information into the state's existing system, and making it available to the law enforcement agency with jurisdiction over that institution. *See* Pub. L. No. 106-386, *supra*, § 1601(b) (to be codified at 42 U.S.C. § 14071(j)); 67 Fed. Reg. 10,758 (2002) (explaining that the states' only new obligation regarding disclosure is to inform the campus police department (if there is one) of the presence of registrants at the school).

The statutory provision cited by petitioners and the United States regarding a purportedly new obligation to disclose the names and information of all registered offenders is not directed to the states. That provision

requires public and private colleges and universities that receive federal education funds to inform the campus community where information about sex offenders enrolled at, or working on, campus "may be obtained." Pub. L. No. 106-386, *supra*, § 1601(c) (amending 20 U.S.C. § 1092(f)(1)). It does not require a college or university (much less the state) to provide all the information in its possession to the public. *Cf.* 146 Cong. Rec. H4184, H4188 (daily ed. June 12, 2000) (earlier version of bill, which Congress chose not to enact, that would have mandated disclosure by federal fund recipient of the names and information of all persons on the registry). There is no unambiguous statement in the statutory text, such as the Court has required to impose a condition on federal fund recipients, limiting the recipients' discretion regarding which offenders' registry information is made available to the public. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

D. *Amici*'s Substantive Due Process Argument Was Not Raised By Petitioners, Would Require The Court To Address Complex Arguments In The First Instance, And Is Unpersuasive

Some of the *amici* supporting petitioners suggest that this case be resolved on the grounds of substantive due process, rather than procedural due process. That suggestion should be rejected.

1. Petitioners did not raise any substantive due process claim in their petition for certiorari. *See* Pet. i (question presented is whether the court of appeals "erroneously conclude[d]" "in a manner inconsistent with the Court's ruling in *Paul v. Davis*" that the registry implicated a liberty interest and violated due process). Petitioners' opening brief in this Court contains no mention of the interaction between substantive due process and the *Paul v. Davis* inquiry. *Cf.* Pet. Br. 29-30 (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), only in support of its argument that registry constitutes, at most, nonactionable group defamation). The case was briefed and

argued at every stage below as involving only whether respondents have identified a liberty interest that would entitle them to procedural due process. *See, e.g.*, Pet. App. A14 ("[t]he parties agree," as did the court of appeals and district court, that the *Paul* test "governs" the appeal); Pet. Cross-Motion for Summ. Jdgmt. 1 n.1 ("defendants' understanding of the legal question to be brought before the court * * * was the existence of the threshold requirement for a federal due process claim, that is, whether or not [the] 'stigma' aspect of the 'stigma plus' test [of *Paul*] exists").

Because a substantive due process defense was not pressed or passed upon below, and was not raised in the petition for certiorari or petitioners' opening brief, it has been waived. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); *United States v. Williams*, 504 U.S. 36, 42 (1992). For the Court to decline to address the newly raised claim is particularly appropriate in this case because of the complexity of the issues it implicates.

2. *Amici*'s substantive due process claim relies on the plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). The United States contends that, under that opinion, so long as there is an adequate "fit" between the legislative classification and a legitimate state interest, no individual has the right, as a matter of procedural due process, to demonstrate that the governmental interest would not be served by imposing on him the reputational injury imposed on other members of the class. *See* U.S. *Amicus* Br. 24-27; *see also* Crim. Justice Legal Found. *Amicus* Br. 4-15. That novel approach to the case is based on a number of erroneous assumptions.

The argument is premised on the claim (*see* U.S. *Amicus* Br. 27 n.10) that the only function of the Connecticut sex offender registration scheme is to disseminate truthful information to the public. But the Connecticut sex offender registration scheme branded each respondent a danger to public safety, even though Connecticut had not determined whether a particular respondent posed any danger to anyone. *See* pp. 23-30, *supra*. As another of

petitioners' *amici* acknowledges, the Government has no legitimate interest in depriving a person of his reputation by conveying false stigmatizing messages about a particular individual. *See* Criminal Justice Legal Found. *Amicus* Br. 9-10.

Amici's substantive due process argument also assumes that classifications that impinge on reputation are subject to only rational-basis review. U.S. *Amicus* Br. 25. But the Court has never been confronted with a statutory scheme that publishes statements branding individuals as dangerous based on their membership in a class, without providing any opportunity for an individual to show otherwise. To assess the constitutionality of such a scheme, the Court would first have to address the question it expressly left open in *Paul*, 424 U.S. at 711 n.5, regarding what protection is afforded to reputation as a matter of substantive due process. That difficult question was not addressed by the courts or parties below. Given the history surrounding one's interest in reputation, there is a strong basis for arguing that an individual's right to be free from false stigma, like his right to be free from physical restraint, is a component of liberty protected by due process. *Cf. Albright v. Oliver*, 510 U.S. at 283-284 (Kennedy, J., concurring in judgment) (assuming "that some of the interests granted historical protection by the common law of torts (such as the interest[] in freedom from defamation * * *) are protected by the Due Process Clause").[16]

[16] *Paul* limited its assessment of whether reputation was a component of "liberty" by virtue of its status as an interest "recognized and protected by state law" or a right "incorporated" from the Constitution's first eight amendments. 424 U.S. at 711 & n.5. The term "liberty," however, also extends to interests "which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (citations omitted). The *Paul* Court expressly disclaimed any intention to resolve whether reputation fell within that category, *see* 424 U.S. at 711 n.5, and it may in fact meet both elements articulated by this Court. *See* L. Eldridge, *Law of Defamation* § 53, at 293-294

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Injury to reputation almost inevitably affects the willingness of others to associate or do business with an individual, thus limiting an individual's choices about where to live, what job to hold, and who will be his friends and acquaintances. *See* 1 W. Blackstone, *Commentaries* *134 (without one's reputation "it is impossible to have the perfect enjoyment of any other advantage or right"). Therefore, although it does not restrain an individual from physically interacting with the world at large, an injury to reputation can lead to a similar result by causing those around the individual not to interact with him. In situations involving deprivations of other liberty interests (such as the right to be free from physical restraint) based on predictions of dangerousness, the Court has required individualized assessments after notice and an opportunity to be heard. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 692 (2001); *id.* at 721 (Kennedy, J, dissenting) ("Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns * * * on whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large."). *Compare Weinberger v. Salfi*, 422 U.S. 749, 772 (1975) (due

(1978) ("There is no doubt about the historical fact that the interest in one's good name was considered an important interest requiring legal protection more than a thousand years ago, and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection."); 1 W. Blackstone, *Commentaries* *134, *127 (describing a person's "security of his reputation or good name from the arts of detraction and slander" as one of the "absolute rights of every Englishman which, (taken in a political and extensive sense, are usually called their liberties)"); *cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("the individual's right to the protection of his good name 'reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty' ").

process requires individualized assessments when a rule burdens an interest that "enjoys" a "constitutionally protected status"), *with Michael H.*, 491 U.S. at 122-129 (plurality opinion) (holding that plaintiff had no protected liberty interest).

3. In any event, the substantial over-inclusive and under-inclusive nature of the Connecticut sex offender registration scheme undermines any claim that it could survive even rational basis review, absent some form of individualized assessment. *Cf. Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974). The breadth of the scheme, which includes nonviolent misdemeanants, draws into question the rationality of its presumption that all registrants share the characteristic of current dangerousness that is somehow different from that of the general population of convicted felons and misdemeanants. Indeed, some of the crimes included have no sexual component, Pet. App. A8 n.13, and the recidivism rates vary significantly among persons convicted of different types of offenses. *See* U.S. *Amicus* Br. 3 (contrasting recidivism rates of offenders that target children with other sex offenders); National Governors Ass'n *Amicus* Br. 12 (discussing study describing the "marked hetrogeneity of sexual offenders"); Ass'n for the Treatment of Sexual Abusers *Amicus* Br. 11-14 (collecting studies); Office of the Public Defender of NJ *Amicus* Br. 6-7 (same).

The lack of a rational nexus between means and ends is further exacerbated by the capricious nature of the exemptions. For example, a first offender convicted today cannot seek an exemption that is available to those convicted of the same offense before July 1, 1999. *See* p. 12, *supra*. Also, an adult convicted of the misdemeanor of nonconsensual "sexual contact" with a sixteen year-old can be exempted from registering if the court finds that it is "not required for public safety," *id.* §§ 53a-73a(a)(2); 54-251(c), but an adult who lewdly exposes his body to the same child, thus committing the misdemeanor of "public indecency," *id.* § 53a-186, cannot be exempted. The over-inclusiveness of the Connecticut statutory registration scheme is further evidenced by inclusion on the publicly

disseminated registry of individuals who the State has determined in parole or mental health hearings should be released from confinement because they will *not* pose a danger to public safety and will *not* violate the law. *See* p. 6, *supra*.

The Connecticut sex offender registration scheme also ignores the ability of offenders to be successfully treated. For example, when it requires a court to determine, at sentencing, whether a person convicted of a felony committed for a "sexual purpose" should be required to register after completion of his sentence, *see* p. 5, *supra*, the scheme deprives the court of the ability to assess any treatment the offender receives while incarcerated. But as the Court recognized in *McKune v. Lile*, 122 S. Ct. 2017 (2002), "[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism." *Id.* at 2024. The rate of recidivism of sex offenders who are treated is significantly lower than those who are not. *Ibid.* Yet offenders who have undergone such treatment may, based on a pre-treatment assessment, be required to register and have their registry information publicly disseminated in the same manner as those who have not received treatment.

Absent the opportunity for a registrant to be heard on whether he is a danger to public safety, the stated purpose of the Connecticut statute – to protect the public by informing them of the whereabouts of those offenders who are dangerous – will not be achieved. Instead of providing a tailored list of persons whom the State has determined pose a danger to public safety, the State provides a long list of names and faces about whom the public is told to "beware." The overbroad category overloads the public by including information about offenders who do not pose a danger, thereby frustrating the purpose of the State's warning. In the absence of such individualized assessments, moreover, many respondents will remain falsely stigmatized as "Registered Sex Offenders" who are dangers to public safety, while having their legal rights and status altered by intrusive, state-compelled reporting

obligations, and by elimination of their state law remedies against state officials for any injury suffered due to the registry's publication. Those burdens on liberty should not be borne by those who have no opportunity to demonstrate that, in fact, they are not dangerous.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

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DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners

v.

SAMUEL POE
JOHN DOE

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

Through its Sex Offender Registry, Connecticut makes available to the public truthful information about convicted sex offenders. Unlike the Respondents, the State trusts its citizens to evaluate appropriately this truthful information in deciding how best to protect themselves and their families. The Constitution does not require the withholding of such truthful information, lawfully in the hands of government, absent an evaluation of dubious reliability regarding each convicted sex offender's future dangerousness.

The communication of truthful information, coupled with the explicit disclaimer that the State has made no determination about the dangerousness of any particular individual, does not and cannot imply that any one individual is dangerous. If the Respondents are stigmatized, it is because they are convicted sex offenders, not because of any purported implicit message arising from the context or composition of the Registry website. Moreover, because the requirements of registration are independent of whether the registration information is publicly

disseminated, the Respondents' rights or legal status are not altered by or because of the Registry's availability to the public. The Respondents' obligation to provide the information required by registration continues. The only difference is that, under the ruling the Respondents seek, the public is denied the opportunity for meaningful access to truthful information. Public availability of the truthful Registry information does not deprive the Respondents of liberty within the meaning of the Constitution.

I. PUBLIC AVAILABILITY OF THE TRUTHFUL REGISTRY INFORMATION DOES NOT CONSTITUTE DEFAMATION.

To establish the deprivation of a reputation-based liberty interest, the Respondents must first demonstrate that the communication in question is defamatory and false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11-12 (1990). The Respondents cannot do so for several reasons.

The dissemination of truthful information about the Respondents, accompanied by a statement disclaiming any representation regarding the dangerousness of any one individual, simply does not stigmatize in a way that gives rise to a claim for defamation, let alone in a way that implicates the Due Process Clause. The Respondents contend that they are stigmatized because the undifferentiated nature of the Registry sends an implied message that every individual on the Registry is dangerous. Identification as having been convicted of a sex offense may indeed be a stigma; however, this opprobrium results from the conviction, not from the public communication of that identification. Finally, not only is the information provided in the Registry true and objectively verifiable, but any "inference" the Respondents or the Court of Appeals attribute to the Registry is incapable of being proved "true or false."

A. Connecticut's Registry Is Not "Undifferentiated" And Does Not Implicitly Defame.

The Respondents concede that only accurate, verifiable information is explicitly stated in the Registry with respect to any single registrant, and they do not claim that any inaccuracy exists in the general information provided in the introduction to the Registry. Although the Respondents dispute the efficacy of the

disclaimer, they do not suggest that its plain language is false. Further, they do not dispute that the Registry contains a warning against using Registry information to harm any person. Thus, the Respondents are left to assert that they are stigmatized by an *inference* that *might* be drawn from the accurate information made available to the public.

The inference that the Respondents claim arises from the Registry – which they claim gives rise to a defamation action and, in turn, to a § 1983 action – is that all registrants are "currently dangerous." Re. Br. 16. The Court of Appeals drew a different inference: that members of a group of persons convicted of a crime are more likely than the average person to commit another crime, a conclusion hardly worthy of debate.[1] JA 251.

The Respondents take issue with numerous contextual characteristics of Connecticut's Sex Offender Registry, especially as it appears on the Internet, and the Petitioners respond to these claims in the next section. *See* § I.B, *infra*. Standing alone or collectively, these characteristics do not connote current dangerousness and are not of constitutional magnitude. Neither is that really what this case is about, as litigated or decided.[2] Rather,

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[1] The Court of Appeals specifically rejected the notion that the inference the Respondents advance could be drawn from the publication of the Registry information, stating that it could "not conclude . . . that visitors to the website necessarily understood it to say *or imply* that all of the registrants are in fact currently dangerous." JA 250 (emphasis added). Indeed, "shar[ing] some of the State's doubt," JA 249, and finding the District Court's opinion "not entirely clear," JA 248, the Court of Appeals stated:

> Even the disclaimer itself, by asserting that the DPS 'has made no determination that any individual included in the Registry is currently dangerous,' . . . implies that some may be. . . . We *think* that it *follows* that publication of the Registry *implies* that each person listed is *more likely than the average person to be currently dangerous*."

JA 251 (emphasis added).

[2] For example, Registrants could be listed without a current photo or without a current address; the Legislature could included fewer offenses within the definition of "sexual offenses"; the State could change the title of the website from "Sex Offender Register" or stop calling the individuals "registered" sex offenders; or the disclaimer could be made more airtight, explict or to the Respondents liking. Under the Court of Appeals' analysis, however, a defamatory "inference" would arise nonetheless, and presumably the Respondents would make the same constitutional claim. The Registrants would

both the Respondents and the courts below attribute their respective implications of danger to the "undifferentiated" nature of the Registry: that is, that all registrants are indistinguishable. JA 145-47, 250-51; Re. Br. 16-17.

The characterization of the Registry as undifferentiated is simply incorrect. Registrants are differentiated in very meaningful ways: by precise nature, number and age of convictions. The persistent theme of the Respondents' argument is that different offenders are juxtaposed against one another in an undifferentiated fashion, causing less serious offenders to be stigmatized. In fact, registrants are only truly undifferentiated from (and juxtaposed against) those with similar types, number and age of convictions. For example, the public can readily distinguish a registrant convicted several years ago of one act of Sexual Assault in the Fourth Degree from one with multiple or recent convictions for Sexual Assault in the First Degree. The Respondents suggest that registrants should be further differentiated by risk level, e.g., "low," "medium," or "high." It is difficult to discern how the addition of this sort of debatable, subjective, and very likely unreliable information would either reduce stigma or increase the accuracy and utility of the web site.

It is certainly not obvious that the inclusion of risk assessments by "experts," arbitrators or governmental bureaucrats would result in a more accurate web site. While the public may not be able to distinguish two offenders convicted of the same offense on roughly the same date based simply on Registry information, it is also not clear that "experts" could do a better job of assessing the relative risk of two such offenders, particularly given that type, number and age of convictions are traditionally considered key factors in assessing the risk of reoffense. Indeed, a member of the public, balancing the Registry information against her own knowledge and observations of the registrant in the community, might well make an equally or even more accurate assessment of an offender's risk than that resulting from a judicial or administrative risk assessment process.

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still be undifferentiated and allegedly defamed by their association with one another.

The Respondents, have their own view of what type of "differentiation" is appropriate in such a Registry, however, and urge this Court to adopt it as a matter of constitutional law. Specifically, they argue, and the Court of Appeals held, that the government may not constitutionally provide to its citizens the true and objectively verifiable information it maintains in the Registry until the government has made individualized, subjective assessments or predictions about how someone will act in the future: that is, how likely it is they will reoffend.

As argued in the Petitioners' opening brief, and as amplified below, no constitutional rights are infringed, principally because the Registry does not give rise to a false inference of "current dangerousness" that can properly serve as the predicate to a defamation action or a Due Process Claim. Moreover, dictating to the States how sex offender Registry information must be compiled and disseminated is inconsistent with the Wetterling Act and with well established principles of federalism, both of which leave it to the States, as a matter of policy, to evaluate and determine the most effective way of providing the public with appropriate information about convicted sex offenders. Dictating such a policy determination as a matter of constitutional law is especially inappropriate in this context in which the mandatory assessment the Respondents would have the Court impose is not universally accepted as either possible or accurate.[3]

The Respondents suggest that the public's need to know about convicted sex offenders can be satisfied by the availability of any known offender's conviction history, at least in the absence of individualized risk assessments. Connecticut citizens may request, for a fee, the conviction history of a person whose full and

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[3] Indeed, the Respondents' efforts to demonstrate the feasibility of sex offender risk assessment reveals what is really at stake. As evidenced by the Declarations filed with this Court, the process of risk assessment is neither easy nor inexpensive. *See, e.g., Doe v. Poritz*, 662 A.2d 367, 382-83 (N.J. 1995) (judicial review of administrative hearing, notice, right to counsel, state-provided counsel and expert witness if indigent, discovery, burden of persuasion by clear and convincing evidence on the State, and right to appeal); *Doe v. Pataki*, 3 F. Supp.2d 456, 471-72 (S.D.N.Y. 1998) (Right to counsel in assessment hearings, counsel at state expense in event of indigency, pre-hearing discovery, burden of persuasion by clear and convincing evidence borne by state, right to appeal); N.J. Pub. Dfdr. *Amicus* 10-16.

correct name and birth date is known to them. Conn. Gen. Stat. § 29-11(c). In the absence of an individualized risk assessment process, the Respondents claim, the public cannot be trusted with any other information.[4] The Respondents miss the point. It is not just that it is burdensome to require citizens to make these sorts of individualized requests, it is a far less accurate and effective means of disseminating the information.

Under the system the Respondents advocate, the following scenario would result. A single mother's acquaintance shows interest in her and her children, or offers to care for the children occasionally. If the mother seeks to inform herself with accurate conviction information regarding the acquaintance, she must either pay a fee and provide an accurate name and birth date or social security number, or she must wait until a governmental entity decides such accurate information is acceptably available to her, along with a subjective, and perhaps erroneous, label regarding that person's risk.[5] She is also precluded from inquiring as to

[4] *Amici* argue that a subjective risk assessment is necessary because the public are likely to harm or harass registrants they will perceive, from the undifferentiated Registry, to be currently dangerous. D.C. Pub. Dfdr. *Amicus* 20; N.J. Pub. Dfdr. *Amicus* 10; Assoc. Trmt. *Amicus* 9-10. The Respondents have never presented any evidence of physical threat to registrants by virtue of Connecticut's law, fully operational for over two years before the injunction, and the Department of Justice has found these concerns to be unsubstantiated. 64 Fed. Regs. 572, 582 (1999). The Respondents never presented evidence of this or other harms to registrants (which would be termed evidence of damages in a defamation case) such as loss of employment, housing, or ostracism. While such evidence would be inappropriate if offered in support of the "plus" portion of respondents' case, such evidence is appropriate in a defamation action. *Intercity Maint. Co. v. Local 254, SEIU*, 241 F.3d 82, 89 (1st Cir.), *cert. denied*, 122 S.Ct. 48 (2001). None was offered, and none required by the lower courts. Furthermore, *Amici* and the declarations filed in support of respondents mistakenly assume that there is no process by which persons challenging either their status as registrants or Registry material might do so. N.J. Pub. Dfdr. *Amicus* 14, 17-18; Assoc. Treatment *Amicus* Br. 17-18; Donovan, Johnson, Gallo, Lane, and Buncher Declrs. As the parties have stipulated, and as noted in respondents brief, however, there is such a process. Re. Br. 10; JA 12, 109.

[5] Another scenario presents itself: a boy-friend wants to co-habit with the mother and her children. *Amici* claim that offenders who have committed offenses against children within their household are unlikely to repeat offend outside their home. N.J. Pub. Dfdr. *Amicus* 9; Assoc. Trmt. *Amicus* 12-13. Living situations are, however, subject to change. Moreover, the fact that sex offenses are most often committed by persons known to the victim does not render the Registry

convicted sex offenders in her neighborhood in the absence of their birth dates, social security numbers or even names, again, unless and until a government entity adds its subjective label to the accurate information already in the government's possession. If the risk assessment is inaccurate, if the mother's request is wrong, or if information is withheld that might otherwise have been provided, the single mother and her children bear whatever risk results. All of this is claimed to be necessary in order that the public not understand any given registrant or the group of registrants to be currently dangerous. The mother is thus deprived of desirable, relevant information her State maintains but cannot share, information previously available at the touch of a button.

Connecticut's policy is sound: to provide, upon request and with relative ease, verifiable conviction information regarding convicted sex offenders, to make that information meaningful by providing context, that is, address and precise offense(s), and to avoid the cost and difficulty of predicting which specific members of a group known to offend again will do so.[6] Connecticut has modified its registration and public access law in response to an evolving understanding of how best to accommodate competing interests.[7]

irrelevant, despite *amici's* claim. Assoc. Trmt. *Amicus* 12-13. *Amici* assume erroneously that a sex offender registry is only useful in the context of a stranger assault. While this may be true regarding other forms of notification, such as a flier or media release, a computerized registry that must be accessed has more widespread application. A review of the Registry could provide information regarding a trusted or known individual. While respondents and *amici* claim that figures on sex offender recidivism are generally inflated, and vary widely depending on individual characteristics that may or may not be static, state legislatures are entitled to credit different studies than those now presented by opponents. Assoc. Trmt. *Amicus* 12-13; N.J. Pub. Dfdr. *Amicus* 8-9.

[6] The Respondents and *amici* claim that petitioners fail to recognize the value of treatment for sex offenders. Re. Br. 49 N.J. Pub. Dfdr. *Amicus* 6. This is certainly not the case. No Connecticut statute or policy discourages treatment: indeed, the State provides sex offender treatment in a variety of settings such as correctional facilities and for persons on probation. Assoc. for Treatmt. *Amicus* Br. 1. Registration and public access to registration information is viewed by some groups as beneficial to treatment and recovery for sex offenders. *See* www.calsexoffenders.net for discussion of benefits to offenders from registration.

[7] Connecticut's public acts regarding sex offender registration and/or public access include Public Acts 1994-246, 1995-142, 1998-111, 1999-183, 2001-211 and 2002-7.

The wisdom of Connecticut's choice regarding the unique problem of sex offenders, of course, is not what is before this Court. Rather, it is whether the policy choice preferred by the Respondents is constitutionally mandated. It is not.

B. The Various Aspects Of The Registry That The Respondents Fault Do Not Imply That An Individual Is Currently Dangerous.

The Respondents have several quibbles with the content and presentation of the Registry, especially on the Internet website, that they contend contribute to the purported stigma. Along with being beside the point of the Court of Appeals' holding regarding an "undifferentiated" Registry, none of the contextual characteristics give rise to a false stigma.

For example, the Respondents attempt to attribute the stigma of dangerousness to the manner in which the Registry information is displayed on the website.[8] They first complain that the very term "sex offender" automatically connotes that an individual is "the scourge of modern America." Re. Br. 23. Yet the label is indisputably accurate as to every registrant.

> The *Restatement of Torts* provides that when a statement is a specific allegation of the commission of a particular crime, the statement is true [thus not actionable] if the plaintiff did commit that crime. If the accusation is general and implies the commission of unspecified misconduct of a particular type, the statement is true if the plaintiff committed any misconduct of that type. Thus a charge that another is an embezzler is true if he committed a single act of embezzlement.

Restatement (Second) of Torts, § 581A, comment c (1977). Likewise, § 571 of the Restatement specifically provides that an imputation of the capability to commit criminal conduct is *not* sufficient: ***"[I]t is not enough merely to suggest that another is capable of committing a crime or that he would commit it if sufficient opportunity were presented. Neither is it sufficient to charge another with a criminal intention or design, if no criminal act is charged."*** *Id.*, § 571 comment c. That society considers the behavior resulting in the label of "sex offender" odious does not mean that the State may make no statement about that behavior or publicly identify those persons so convicted.[9]

The Respondents go on to claim that it is not merely the term "sex offender" that stigmatizes them, but the term "Registered Sex Offender," presumably because the term "registered" connotes a determination of dangerousness by the State. Re. Br. 23-24. But the law requiring offenders to register and the creation of a Registry by the State are not challenged – only the availability of the Registry to the public. Were the State to delete the term "registered," the Respondents' obligation to comply with registration would still exist. That the Respondents are registered, in addition to being convicted sex offenders, is, and will remain, true.

The Respondents also contend that including a registrant's current address leads ineluctably to an inference of current dangerousness because if registrants were not dangerous there would be no need for current addresses. Re. Br. 24. They can cite no authority for this proposition, however. In fact, the inclusion of address information in Connecticut's Registry does not imply danger, and the Registry explicitly disclaims any determination of individual dangerousness. The inclusion of current addresses does not imply that any single registrant is dangerous, but instead provides accurate information that makes the Registry more

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[8] The Respondents' *amicus* provides a description of Frequently Asked Questions included on the District of Columbia sex offender website. D.C. Pub. Dfdr. *Amicus* 22-23. The Connecticut website did not include any language similar to that cited from The District of Columbia website.

[9] The Respondents and their *amici* repeatedly return to their refrain that sex offenders are singled out from other convicted persons, presumably unfairly. This is an equal protection claim that is not part of this case. Nor does it have any constitutional basis. Sex offenders are not "similarly situated" to other offenders: they have committed very different offenses. Further, inasmuch as sex offenders do not make up a suspect class and regulation of them intrudes on no fundamental right, the Legislature is free to distinguish sex offenders from other offenders upon a rational basis – recidivism and the anguish their victims suffer long after the crime's commission. Finally, at best, the Respondents' claim is one of under-inclusiveness (i.e., why not require other offenders to register?). This is not a constitutional claim. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152-53 (1980); *Williams v. Lee Optical*, 348 U.S. 483, 488-89 (1955).

useful, allowing the public to search the Registry geographically and not just by name.

The Respondents argue that the disclaimer is not sufficiently prominent, and, thus, has no effect on the meaning of the Registry. Re. Br. 25. A review of the portion of the website available as an archived record, however, demonstrates that the disclaimer is both clear and prominent. Re. Br. 25, n.9. If the disclaimer were displayed even more prominently, the Respondents would still contend that the suggestion of dangerousness as to each registrant persists. Re. Br. 26. They provide no authority for the patently erroneous proposition that a disclaimer is irrelevant to the meaning of an allegedly defamatory communication. Certainly, the Court of Appeals did not disregard the disclaimer.[10] JA 249.

Given the accuracy of the information in the Registry and the presence of the disclaimer, the Respondents are forced to search far afield for defamatory meaning, resorting to legislative history and other states' caselaw and experiences. The essence of their argument is that the collective mindset of the public so reviles sex offenders that the State can make no statement, however true and objectively verifiable, that does not defame them. The law of defamation, however, has never held that

[10] Contrary to their claim that the Registry is completely undifferentiated, and thus defamatory, the Respondents also urge that the Registry is overbroad, including, for example, school children who playfully slap each other's buttocks in a school hallway in the Registry, along with much more serious sexual offenders. Re. Br. 3, citing *In re Mark R.*, 757 A.2d 636 (Conn. 2000). A minor adjudicated as a Youthful Offender, as was Mark R., is not required to register in Connecticut and thus is not included in the Registry. Conn. Gen. Stat. §§ 54-250 *et seq*. Moreover, although Connecticut's Supreme Court held that contact with a victim's buttocks satisfies the element of sexual contact for Sexual Assault in the Fourth Degree, a Class A misdemeanor included as a registrable offense, the court's inquiry went further in that case. *Id*. The court found the defendant possessed an intent to degrade or humiliate, noting a series of events in which a 12 year-old victim was restrained and chased by two students, then repeatedly slapped on the buttocks by the assailant who also tried to pull down her pants, while the other student held her arms and successfully made contact with her breasts. *Id*. Under these facts, an adult in Connecticut could in fact be convicted of Fourth Degree Sexual Assault, and required to register. Thus, the respondents chose a poor example to illustrate their point of overbreadth (which is not the constitutional claim at issue). Their representation that a mere slap on the buttocks results in inclusion in a Registry that defames schoolchildren simply does not hold up.

already unpopular persons can more easily establish defamation because of their social standing. To the contrary, because defamation typically requires proof of damage to reputation, it would seem that an already tarnished reputation is an impediment to stating a defamation claim. The Respondents' appeal to legislative history is equally unavailing. Although legislative history might have a bearing on a statute's meaning and scope, which are not in dispute here, it has no relevance in a defamation action in which the truth and effect of a published statement are the dispositive issues. Users of the Registry are not alleged to have read or to have been affected by the legislative history of Connecticut's Act.[11]

C. An Implied Defamatory Statement, Without More, Is Insufficient To Allege A Deprivation Of A Liberty Interest.

Even accepting the inference the Respondents urge, both courts and scholars have suggested that defamation by implication, without more, is not generally recognized as a basis for common law defamation actions. *See, e.g., White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990) ("[I]f a communication, viewed in its entire context merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established"); W. Page Keeton, *Prosser & Keeton on the Law of Torts* § 116, at 117 (5th Ed. Supp. 1988) provides:

> [T]he defendant who states all the particular facts correctly, does not omit facts necessary to put them in context, and does not juxtapose the facts in a far-fetched way to create libelous implications, is not liable even if the conclusion to

[11] The Respondents and *amici* argue that a computerized collection of material is somehow more intrusive than other government information. Over half of the states use or used the Internet to make available sex offender registration information, regardless of their use of risk assessment. *See* Petition for Certiorari 15, n.15 for a listing. That technology improves accessibility to the information does not offend the Constitution. *Whalen v. Roe*, 429 U.S. 589, 607 (1977) (Brennan, *J.*, concurring), and that the dissemination of information is improved does not make the information any less true.

> be drawn from the facts is clearly defamatory . . . . The difference . . . seems to be whether the particular facts were manipulated, omitted, or artificially juxtaposed to create untrue implications; if so, the truth of the particular facts provides no protection; if not, the truth is complete protection. .[12]

In this case, no manipulation or omission of facts can be attributed to the Registry. The Respondents' nevertheless claim that one category of facts is omitted from the Registry: namely, information regarding the results of individualized risk assessment hearings. A true statement, however, cannot be rendered defamatory because of the absence of a fact not yet known — and not even capable of being established with any reliability.

The Respondents' argument regarding group defamation is likewise unpersuasive. They claim that, because information is provided that is specific to each registrant, the group defamation theory does not apply. This argument ignores the fact that, again, as to each individual registrant, only accurate information is provided. Any inference of dangerousness that might arguably be drawn, results from the group nature of the Registry: that is, the fact that all registrants are included together, without the sort of differentiation the Respondents would like to see. The Court of Appeals likewise inferred only a statement about a group: that is, "*some* of the persons" listed. JA 250. Given this general inference regarding members of a large, undifferentiated group, as the Respondents would characterize it, the defamatory statement, if any, relates to members of the group at large, and thus, such a

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[12] The Respondents rely, as did the Court of Appeals, on *the Restatement (Second) of Torts* §§ 563, 571 (1977), for its general statement of the law regarding indirect statements as the basis for defamation, ignoring the specific rule applicable to statements of one's capability to commit crime. Recent case law and commentators reach a far more limited conclusion than the *Restatement's* general proposition that any false inference arising from the truthful information may form the basis for a defamation claims. *See also* R. Sack, *Sack on Defamation*, (3d ed. 2002) § 2.4.5 ("*In recent years*, courts have increasingly imposed limitations on recovery for libel by implication.") (emphasis added); B. Sanford, *Libel and Privacy*, § 6.6 (2d Ed. 1987 & 1997 Supp.) (noting that "*current case law* . . . deals with the issue of false implications as a subspecies of whether a news report is capable of a defamatory meaning") (emphasis added).

statement is insufficient to form the basis of a defamation action. Pt. Br. 27-29. A statement insufficient for a defamation action, *a fortiorori*, is insufficient for a claim of constitutional defamation.

D. The Alleged Implied Message Of Dangerousness Is Not Capable Of Being Proved True Or False.

Even if this Court were to accept the theory that constitutional defamation can be based on an imputed, but disclaimed, likelihood to commit criminal conduct, the Respondents fail to establish their cause of action. The Respondents ignore the dispositive issue of whether the alleged statement in this case is capable of being proved true or false. *Milkovich*, 497 U.S. at 15. This omission is fatal to the Respondents' cause.

The Court of Appeals noted: "[t]he gravamen of 'stigma' as part of a due process violation is the making under color of law of a reputation-tarnishing statement *that is false*." JA 247, citing *Codd v. Velger*, 429 U.S. 624, 627 (1977) (emphasis added). Moreover, the alleged statement must be "capable of being proved true or false." *Milkovich*, 497 U.S. at 15 ("[A] statement on matters of public concern must be *provable as false* before there can be liability under state defamation law") (emphasis added). The Respondents completely fail to address the essential element of falsity.[13] That the Respondent fail to allege a clearly discernible statement capable of being proven true or false precludes any further consideration of the Respondents' constitutional claim.[14] *Codd*, 429 U.S. at 628-29.

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[13] Certainly, the Respondents have never alleged that any inference of dangerousness is false as to the entire class of registrants or as to all registrants individually. The District Court avoided the necessity for such a claim as to all registrants, by allowing the singular named plaintiff to allege that he was not dangerous, JA 113, simultaneously declaring the law unconstitutional, then later certifying as the plaintiff class all registrants. JA 244-45; 3.

[14] Surprisingly, respondents' analysis seems to conflate the tort of defamation, and its requisite element of defamatory meaning; their entire analysis goes to the latter. The Respondents only partially quote *Codd v. Velger*, which requires a statement both "false and defamatory" in order to be sufficient, as opposed to merely "defamatory". *See Codd*, 429 U.S. at 628; Re. Br. 22. This Court used both concepts in *Milkovich*: "[Previously,] one needed only allege an unprivileged publication of *false and defamatory* matter to state a cause of action for *defamation*." *Milkovich*, 497 U.S. at 13 (emphasis added). The Respondents fail to provide this Court with a discussion of these elements.

If this Court determines that the essential message of the Registry is no more than a statement that any given registrant is more likely to be dangerous than the "average person," as did the Court of Appeals, absent any allegation that *this* statement is false or capable of being proved false, the Respondents' defamation action fails as a matter of law. *Id.* Even if the Court credits the Respondents' claim that the Registry defames all registrants as currently dangerous, the existence of a demonstrable falsehood is absent as to any particular registrant. Pt. Br. 24-25. The Respondents certainly provide no argument or evidence to the contrary.

Significantly, the Respondents do not even attempt to argue that predictions of future behavior in the form of risk assessment are at all reliable, having conceded at the Court of Appeals that such hearings are, themselves, "risky."[15] The Respondents present no studies or precedent supporting a claim that "dangerousness" is capable of being proved true or false, or even more or less likely, in any reliable way. Rather than argue the feasibility of risk assessment, their sole argument is that such relative determinations are attempted in other contexts. It is true that Connecticut, like most States, attempts approximations of future criminal conduct – for purposes of bail, parole, involuntary commitment and probation. In those situations, however, the risk assessment is made for the purpose of a custodial or placement decision that is unavoidable – an individual must be placed, treated, or supervised.[16]

But the inexact science of predicting the future for its own sake, or for the purpose of educating the public, is far different than considering relative custody or placement options. Moreover, it is a far different task than proving or disproving an historical fact necessary as an element in a defamation action. Defamation law is unique in that it speaks in the non-relative terms of "true" and "false." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499 (1975). In any event, the Respondents have

[15] *See* Transcript, oral argument, July 12, 2002, p. 7.

[16] *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997) (involuntary civil commitment of sex offenders); *Shall v. Martin*, 467 U.S. 253 (1984) (regarding assessment of future dangerousness in context of juvenile detainees).

provided no evidence at any time that "dangerousness" is capable of being proven "true or false," yet they themselves claim that a constitutional defamation arises from the alleged inference.

The Respondents' failure to address falsity as an element of their defamation claim likewise underscores the insufficiency of their claim under the group defamation doctrine. Any discernible imputation of dangerousness that could possibly arise results from membership in the "group" of registered sex offenders – it is an inference so amorphous and non-specific as to be incapable of verification as to any single registrant.[17] At the same time, it is statistically accurate to describe the group as a whole as more likely to commit sex offenses than the population in general, and it was perfectly rational for the Legislature to so conclude. *McKune v. Lile*, 122 S. Ct. 2017, 2024 (2002).

II. THE PUBLIC AVAILABILITY OF THE REGISTRY INFORMATION DOES NOT RESULT IN A CHANGE IN ANY PREVIOUSLY RECOGNIZED RIGHT OR LEGAL STATUS.

This Court made clear in *Board of Regents v. Roth* that "the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interest that *a person has already acquired in specific benefits.*" 408 U.S. 564, 576 (1971) (emphasis added). The Respondents have not lost, by virtue of either the registration requirements or the statute's immunity provision, any right "previously vouchsafed" by the State. *Paul v. Davis*, 424 U.S. 693, 712 (1976). All that the Respondents can assert is an alleged impairment of an unrecognized interest in avoiding the obligations arising out of their criminal convictions. This does not suffice for purposes of the Due Process Clause.

A. Because The Respondents' Registration Obligations Preexisted The Registry And Continue In Its Absence, There Is No Alteration in The Respondents' Status.

[17] Not only is the alleged defamation based on the mere possibility of an inference, the Respondent and the lower courts could not agree on the precise nature of that inference. *See supra* note 1.

Absent an action "officially removing [an] interest from the *recognition and protection previously afforded by the State,*" no liberty interest exists. *Paul,* 424 U.S. at 711 (emphasis added). The State of Connecticut has never recognized, let alone protected, the right of previously convicted persons to avoid reporting their whereabouts to law enforcement authority. Thus, the law at issue, principally enacted in 1998, removes no previously existing right. To the contrary, since 1994 Connecticut has required persons convicted of sexual assault, of whatever degree, to register in substantially the same manner as the current law. *See Roe v. Office of Adult Probation,* 125 F.3d 47, 48-49 (2d Cir. 1997) (describing the evolution of Connecticut's sex offender registration laws up to that point in time).[18] Under prior law, persons subject to the registration requirements who did not comply were guilty of a class A misdemeanor, one step below the Class D felony now applicable. Conn. Gen. Stat. § 54-102(c) (repealed 1998).[19] Unlike the current law, persons were not required to register with a centralized agency, but with "the chief of police of the police department or resident state trooper for the municipality" of residence. *Id.* That many current registrants were previously required to register, (and for that matter continue to be required to register even under the district court's injunction), demonstrates the disconnect between the purported stigma and the registration requirements. Persons already subject to registration simply suffer no change in legal status.

The Respondents claim that the law does not require a causal connection between the "stigma" and the "plus." Instead they claim that it is sufficient if the alteration of a previously existing right occurs "in the course" of the defamation.[20] Re. Br. 36 This

[18] Respondents cite to Connecticut's 1997 Public Act regarding persons previously required to register. Re. Br. 4. The 1997 Public Act, however, modified existing law. *See Roe v. Office of Adult Probation,* 125 F.3d at 48-49.

[19] Convicted sex offenders were also, as they are now, required to provide blood for DNA analysis although not suspected of any unsolved or future crime. *See Roe v. Marcotte,* 193 F.3d 72, 75 (2d Cir. 1999).

[20] The Respondents quote language from *Owen v. City of Independence,* 455 U.S. 622 (1980), that the purported "plus" need only be "in the course of" the defamatory statement. Re. Br. 36. The Court relegated its discussion of this issue in *Owen* to a footnote because respondents had not properly raised it in that case. *Id.* at 633 n. 13. *Owen* involved the termination of a municipal employee

Court's Due Process decisions require the kind of causal nexus between the alleged stigma and the plus element dispensed with by the Court of Appeals and lacking in the Respondents' allegations. For example, in *Paul,* this Court instructed that "harm or injury" to reputational interests that "does not result in a deprivation of any 'liberty' or 'property'. . . recognized by state or federal law, [or] *has [not] worked any change of respondent's status as theretofore recognized under the State's laws*" is not actionable under the Constitution. *Paul,* 424 U.S. at 712. The alleged "plus" does not even occur "in the course" of the alleged defamation. The requirement to register remains in place.

There is "no logical stopping place" to the scope of the Due Process Clause should this Court recognize an action for constitutional defamation absent any causal or temporal connection between the alleged defamation and the alteration in a previously existing right. *Paul,* 424 U.S 698. This is especially so when the "plus" requirement is met upon minimal state action. The test enunciated by the Court of Appeals amounts to little more than requiring state involvement in the alleged defamation, as result clearly contrary to *Paul's* requirements.[21] JA 271.

who was allegedly defamed by a government official the day after his termination. The Court viewed the termination and the defamatory statement as a unitary action of the government against the employee, thus constituting a liberty interest. *Id.* Unlike the termination of the government employee in *Owen,* the registration requirements here continue in place regardless of the alleged defamation. Thus, this case is more akin to an alleged defamatory statement that is made well after the adverse employment action with no necessary or obvious connection to it. *See Laureano-Agosto v. Garcia-Caraballo,* 731 F.2d 101, 104-05 (2d Cir. 1984) (Breyer, *J.*).

[21] It is incongruous, for example, for the Respondents to argue that the State is as "free"–"to notify the public regarding arrests, to publicize the name of at-large fugitives, or to announce the names of persons wanted for questioning" under the Court of Appeals' ruling. Re. Br. 37, n.11. Under the Respondents' view, the State could be liable for a constitutional tort were it to publish a website of "Wanted Fugitives". Fugitives from the law are subject to criminal prosecution not only for their underlying crime, but for their evasion of authority as well, thus, under the Respondents' analysis, the "plus" is satisfied. A registry of fugitives could result in an impression in the public that such persons might be dangerous, and certainly they would be perceived as more likely than the average persons to commit a crime, thereby meeting the "stigma" test. Any given fugitive, as yet unconvicted of any crime, could claim that, in relation to other fugitives, he is less dangerous.

B. The Immunity Contained In Connecticut's Act Is Not A Material Alteration Of A Previously Existing Right.

Paul v. Davis sought to articulate the logical limit to the procedural protections provided for under the Constitution. It was not intended as a two-factored test by which any person claiming defamation by a government entity could find any additional, loosely related governmental action and thereby limit the ability of states to fulfill their obligations. This Court was clear: "[I]nterests . . . comprehended within the meaning of either 'liberty' or 'property' . . . attain this constitutional status by virtue of the fact that they have been initially recognized and protected *by state law*." *Paul*, 429 U.S. at 710 (emphasis added). In the complete absence of state law protection from registration requirements, the Respondents now submit a novel theory that the additional "plus" element necessary to their claim can be found in an immunity provision included in the Connecticut's SORL.[22]

Not only has the immunity provision argument never before been expressed in this matter, but no court has ever based its finding of a due process violation on an immunity provision. Generally speaking, sovereign immunity is the rule, not the exception, and waiver of sovereign immunity is "a matter of grace which a [legislative body] may condition as it chooses." *Rigsbee v. United States*, 204 F.2d 70, 72 (D.C. Cir. 1953). In this case, the immunity provision at issue makes no discernible change in the rights of registrants inasmuch as the State and its actors possess immunity from actions on the basis of the Registry by virtue of sovereign immunity. As importantly, as the subject immunity provision is specific to the challenged law, it does not change any right to sue that might have existed prior to the challenged law's enactment.

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[22] The Petitioners submit that this Court should decline to address this new argument. An argument raised by a respondent for the first time in a brief on the merits is typically only addressed in "exceptional circumstances." *United States v. Estate of Romani*, 523 U.S. 517, 526 n.11 (1998) (citing *Heckler v. Campbell*, 461 U.S. 458, 468-69 n. 12 (1983)). In this case, this issue was not briefed or presented to the lower courts for consideration. Moreover, no Connecticut court has considered the scope of the new immunity provision.

The immunity provision the Respondents rely on is very specific:

> Neither the state nor any political subdivision of the state nor any officer or employee thereof, shall be held civilly liable to any registrant by reason of disclosure of any information regarding the registrant that is released or disclosed *in accordance with* subsection (a) of this section.

Conn. Gen. Stat. § 54-258(b) (emphasis added). Subsection (a) provides that the newly centralized Registry is a public record "accessible to the public during normal business hours" and requires Internet access to the centralized Registry. Conn. Gen. Stat. § 54-258(a).

This specific immunity provision cannot provide the basis for a previously recognized or protected state entitlement because the Registry was not previously centralized and made available to the public on the Internet. No right to sue the State or its officials regarding public accessibility of the centralized Registry had been previously recognized, and none has existed since then. Thus, the Respondents have exactly the same right to sue the state that they had before the statute's enactment: that is to say, they had no right to sue the state regarding a centralized Registry prior to the enactment of the law and they have none currently. The Respondents have not lost any right "previously vouchsafed to [them]" by the State. *Paul*, 408 U.S. at 576.

In addition, quite separate from the subject immunity provision, no right exists to sue either the State or a state official "by reason of disclosure of any information regarding the registrant that is released or disclosed *in accordance with subsection (a) of this section*" (emphasis added). Conn. Gen. Stat. § 54-258(b). The Respondents argue when they claim that, but for this specific immunity provision, registrants would possess a cause of action "once certain preconditions are met." Re. Br. 27. The "preconditions" are significant and preclusive. Connecticut as a state enjoys sovereign immunity, and that immunity "protects state officials from lawsuits resulting from the performance of their duty." *Hultman v. Blumenthal*, 787 A.2d 666, 672 (Conn. App. 2002) (sovereign immunity bars defamation action against state official in individual and official capacities). When a state official

takes action "representing the state" that is not in excess of his statutory authority, no suit may be brought. *Id.* at 673; *see also Shay v. Rossi,* 749 A.2d 1147, 1172 (Conn. 2000) (conduct within "statutory authority" not actionable). If either the State or a state agency or official were sued for their actions *"in accordance with"* Connecticut's law, thus triggering the immunity in § 54-258(b), sovereign immunity would also operate as a bar.[23] Therefore, the Respondents have lost no previously recognized right by inclusion of the subject immunity clause.

III. CONCLUSION

The Petitioners urge this Court to reverse the decision of the Court of Appeals and remand with instructions to vacate the injunction entered by the District Court and to enter judgment for petitioners.

Respectfully submitted,

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[23] Indeed, Connecticut enjoys sovereign immunity from *defamation* actions against the state or its officials *acting in the course of their duties* quite apart from the immunity section within the registration statutes. *Hultman*, 787 A.2d at 672.

(8)

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v.

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prevents a State from listing convicted sex offenders in a publicly disseminated registry unless it first affords such offenders an individualized hearing on their current dangerousness.

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INTEREST OF THE UNITED STATES

The court of appeals invalidated Connecticut's sex offender registration and community notification law—its Megan's law—on the ground that the Due Process Clause of the Fourteenth Amendment entitles convicted sex offenders to an individualized hearing on current dangerousness before a State may list them in a public sex offender registry.[1] The Connecticut law at issue meets the requirements concerning sex offender registration and notification laws established by Con-

[1] The Court has granted certiorari in *Godfrey* v. *Doe*, No. 01-729, to address a challenge to Alaska's Megan's law under the Ex Post Facto Clause, U.S. Const. Art. I, § 10, Cl. 1. The United States has filed a brief in support of petitioners in that case.

gress and the Attorney General for obtaining certain federal funding. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. 14071 (1994 & Supp. V 1999); 64 Fed. Reg. 572, 582 (1999); Pet. App. A4-A5 n.5. In addition, the Connecticut law employs a categorical notification approach that is similar to the one adopted by the Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (42 U.S.C. 14071(j) (to be codified) and 20 U.S.C. 1092(f)(1)).

STATEMENT

1. Sex offenders inflict a terrible toll on this Nation and its citizens. See *McKune* v. *Lile*, 122 S. Ct. 2017, 2024 (2002) (plurality opinion). In 1995, nearly 355,000 rapes and sexual assaults were reported by victims older than 12 years of age. U.S. Dep't of Justice, Bureau of Justice Statistics (BJS), *Sex Offenses and Offenders* V (1997) (*Sex Offenses*); see U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* 24 (1999). Between 1980 and 1994, the average number of individuals imprisoned for sex offenses increased at a faster rate than for any other category of violent crime. *Sex Offenses* 18. In 1994, nearly 100,000 state inmates were imprisoned for rape or sexual assault; another 134,000 convicted sex offenders were under community supervision, such as probation or parole. *Id.* at 15.

More than two-thirds of the victims of rape and sexual assault are under the age of 18 years. BJS, *Sexual Assault of Young Children as Reported to Law Enforcement* 2 (2000) (*Young Children*); see *Sex Offenses* 24 (80% of sexual assault perpetrators had victims under 18 years). "[N]early 4 in 10" victims of imprisoned violent sex offenders are 12 years or younger. *Sex Offenses* at iii; *Young Children* 2. Even more disturbing, 14% of all sexual assault victims are under the age of 6 years. *Young Children* 2.[2]

Even when they do not result in physical injury or death, sexual assaults inflict enormous harm on victims, especially children. Children who are sexually assaulted are more likely than other children to develop severe psychosocial problems, including depression, antisocial and suicidal behavior, and substance abuse. See J. Briere & M. Runtz, *Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment*, 8 J. of Interpersonal Violence 312, 324 (Sept. 1993). In addition, children who are sexually assaulted are more likely than other youths to become sex offenders as adults, thus perpetuating a vicious cycle of abuse and violence. *Id.* at 312.

When they reenter society at large, convicted sex offenders have a much higher recidivism rate for their offense of conviction than any other type of violent felon. See *McKune*, 122 S. Ct. at 2024; see also *Sex Offenses* 27; BJS, *Recidivism of Prisoners Released in 1994*, at 10, Table 11 (2002); BJS, *Recidivism of Prisoners Released in 1983*, at 6 (1997). Those offenders who target children present an even greater risk of recidivism. BJS, *Child Victimizers: Violent Offenders and Their Victims* 9-10 (1996).

2. Responding to the gravity of the public safety threat posed by sex offenders, the federal government, all fifty States, and the District of Columbia have

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[2] These figures understate the incidence of sex offenses because nearly 70% of sex crimes and 90% of child molestation offenses go unreported. BJS, *Criminal Victimization in the United States, 1999 Statistical Tables*, Table 93 (2001); H.R. Rep. No. 392, 103d Cong., 1st Sess. 4 (1993).

adopted sex offender registration and notification laws to enable citizens better to protect themselves and children from sexual predation and to facilitate law enforcement investigations. See 01-729 U.S. Br. App. A (listing Megan's laws). In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (Wetterling Act), 42 U.S.C. 14071 (1994 & Supp. V 1999), in an effort to stem the tide of sex offenses directed against children in particular, and to galvanize state efforts to enact and bolster registration and community notification provisions with respect to sex offenders.

The Wetterling Act, as amended, establishes minimum national standards for Megan's laws in order for States to qualify for certain federal funding. 42 U.S.C. 14071(g)(2)(A) (Supp. V 1999). Among other things, the Act requires States to register all persons convicted of a criminal sex or (non-parental) kidnaping offense against a minor, and all persons convicted of a sexually violent offense, upon their release, parole, or probation into the community. 42 U.S.C. 14071(a)(1), (3) and (b) (1994 & Supp. V 1999). Registered offenders must provide current addresses, fingerprints, and a photograph. In most cases, they must verify their addresses annually, and must remain registered for a minimum of ten years. See 42 U.S.C. 14071(b)(3) and (6) (1994 & Supp. V 1999). With respect to notification, the Act directs States to "release relevant information that is necessary to protect the public concerning a specific person required to register under [the Act]." 42 U.S.C. 14071(e)(2) (Supp. V 1999).

The Wetterling Act was amended in 2000 to require States, beginning in October 2002, to ensure community notification with respect to registered sex offenders who become students or employees at institutions of

higher education. Campus Sex Crimes Prevention Act (CSCPA), Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (42 U.S.C. 14071(j) (to be codified) and 20 U.S.C. 1092(f)(1)); H.R. Conf. Rep. No. 939, 106th Cong., 2d Sess. 110 (2000). To meet that requirement, States must ensure that covered institutions advise campus communities where information about registered sex offenders may be obtained, "such as the law enforcement office of the institution, a local law enforcement agency with jurisdiction for the campus, or a computer network address." 20 U.S.C. 1092(f)(1)(I).

The Attorney General, at the direction of Congress (42 U.S.C. 14071(a) (1994 & Supp. V 1999)), has issued guidelines implementing the Wetterling Act. 64 Fed. Reg. 572 (1999). The guidelines afford States leeway in formulating their own sex offender registration and notification programs. In particular, they provide that "States * * * are free under the Act to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." *Id.* at 582. They also permit States to make "particularized risk assessments of registered offenders," and to notify the community of such risk assessments. *Ibid.*

3. Like every other State, Connecticut has enacted a Megan's law designed to protect its communities from sex offenders and assist in apprehending repeat sex offenders. The Connecticut law applies to persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses, and felonies committed for a sexual purpose. Covered offenders are required to register with the Connecticut Department of Public Safety (CDPS or State) upon their release into the community. They must provide their name and

address, identifying information such as a photograph and DNA sample, and certain other information. The registration requirement runs for ten years in most cases; those convicted of sexually violent offenses must register for life. Covered individuals must re-register when they move, and periodically submit an updated photograph. See Conn. Gen. Stat. Ann. §§ 54-251, 54-252, 54-254 (West 2001); Pet. App. A5-A7.[3]

The Connecticut law requires the CDPS to compile the information gathered from registrants and to share it with law enforcement authorities and the public. In particular, the law requires CDPS to post a sex offender registry on an Internet website and make it available to the public in certain state offices. See Conn. Gen. Stat. Ann. §§ 54-257, 54-258 (West 2001); Pet. App. A7-A10. Whether made available in person or via the Internet, the registry must be accompanied by the following warning: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." Conn. Gen. Stat. Ann. § 54-258a (West 2001).

The State's Internet website enabled citizens to obtain the name and address, photograph, and description of any registered sex offender by entering a zipcode or town. Pet. App. A8-A9. The following disclaimer appeared on the first page of the website:

> The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. The [CDPS] has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this date on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.

Id. at A9.

[3] In certain instances not at issue here, a court may determine that "registration is not required for public safety." Conn. Gen. Stat. Ann. § 54-251(b) and (c) (West 2001); see Pet. App. A10.

4. Respondent is a convicted sex offender who is subject to the Connecticut Megan's law. In 1999, he filed this action pursuant to 42 U.S.C. 1983 on behalf of himself and similarly situated sex offenders, claiming that the Connecticut law, *inter alia*, violates the Due Process Clause of the Fourteenth Amendment. Respondent alleged that he is not a "dangerous sexual offender," and that the Connecticut law "deprives him of a liberty interest—his reputation combined with the alteration of his status under state law—without notice or a meaningful opportunity to be heard." Pet. App. A11. The district court granted summary judgment for respondent on his due process claim. *Id.* at A41-A66. Shortly thereafter, the court certified a class of individuals subject to Connecticut's Megan's law, and permanently enjoined the public notification provisions of that law. *Id.* at A67-A69.

The Court of Appeals for the Second Circuit affirmed. Pet. App. A1-A40. The court stated that the due process claim is "govern[ed]" (*id.* at A14) by *Paul* v. *Davis*, 424 U.S. 693 (1976). The court held that, to prevail under *Paul*'s "'stigma plus' test," respondent must show that the State made a "stigmatizing statement" about him that he claimed was false; and "some

tangible and material state-imposed burden or alteration of his * * * status or of a right in addition to the stigmatizing statement." Pet. App. A14. The court concluded that respondent satisfied both elements of that test. See *id.* at A14-A35.

The court of appeals acknowledged that the information listed in the State's sex offender registry is "concededly true." Pet. App. A15. But the court reasoned that such information—that those listed on the registry "are persons convicted of crimes characterized by the State as sexual offenses"—nonetheless conveys the "stigma," claimed by respondent to be false, that "each person listed is more likely than the average person to be currently dangerous." *Id.* at A15, A18. According to the court, instead of negating such stigma, the contrary disclaimer on the State's website contributed to it. See *id.* at A17 ("Even the disclaimer itself, by asserting that the DPS 'has made no determination that any individual included in the Registry is currently dangerous,' clearly implies that some may be.").

Although the court of appeals stated that "the import of the 'plus' component [of *Paul*] remains somewhat unclear," Pet. App. A20, it concluded that the "registration duties" established by Connecticut's Megan's law, which it characterized as "extreme and onerous," "easily qualify as a 'plus' factor under *Paul*," *id.* at A30-A31. The court rejected the State's argument that the registration duties could not serve as the requisite "plus factor," because the alleged "stigma arises not from the registration requirement but rather from the publication of the registration information." *Id.* at A33. In the court's view, "the temporal nexus between the stigma and the 'plus' factor in this case is sufficiently close to support a liberty interest." *Id.* at A34.

Under the permanent injunction affirmed by the court of appeals, respondent and other registered sex offenders "are entitled to the opportunity to have a hearing consistent with due process principles to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry." Pet. App. A39; see *id.* at A38.[4]

SUMMARY OF ARGUMENT

Sex offenders pose a unique public threat: they have a much higher recidivism rate with respect to their crimes than any other type of felon; they prey on the most vulnerable members of society; they inflict devastating, life-altering injuries; and they often act with impunity because many sex offenses, particularly those against children, go unreported. The Connecticut law at issue here is part of a nationwide effort to confront that threat by making truthful information of public record more readily available to concerned citizens so that they may educate and protect themselves, and their children. Nothing in the Fourteenth Amendment's Due Process Clause stands as an obstacle to this common sense response to a serious national problem.

Connecticut's community notification provision does not implicate any interest protected by the Fourteenth Amendment. It simply calls for notification of the fact of registration for a sex offense, *i.e.*, the fact of an individual's prior conviction and related truthful information. The release of that information does not implicate any interest protected by the Due Process Clause.

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[4] Respondent also alleged that the Connecticut law violates the Ex Post Facto Clause. U.S. Const. Art. I, § 10, Cl. 1. The district court rejected that claim, Pet. App. A57, and the court of appeals did not reach it, see *id.* at A38.

The Constitution's due process guarantee is not triggered unless, "*as a result of the state action complained of*, a right or status previously recognized by state law was distinctly altered or extinguished." *Paul* v. *Davis*, 424 U.S. 693, 711 (1976) (emphasis added). The notification provision at issue—the state action complained of—does not extinguish or materially alter any state right or status. It does not, for example, result in the loss of government employment or a driver's license. As a result, the Due Process Clause does not entitle respondent to a hearing on his claim of reputational injury.

Moreover, even if respondent could show the deprivation of a protected interest, he still would not be entitled to the hearing he seeks because he has clearly received all the process he is due. Unlike the plaintiff in *Paul*, who was publicly listed as an "Active Shoplifter" based simply on his *arrest* for shoplifting, respondent was listed as a sex offender only after he had received the panoply of procedural protections guaranteed to persons accused of crimes, and was *convicted* of a sex offense. Whatever alleged "stigma" may result from the community notification of the truthful fact of respondent's status as a convicted sex offender, nothing in the Constitution entitles respondent to a post-conviction hearing to attempt to disprove such stigma. See *Codd* v. *Velger*, 429 U.S. 624 (1977) (per curiam). The conviction of a criminal offense may deprive an individual of numerous protected interests, including foremost his liberty to remain at large. The process that is due is afforded in the underlying criminal proceedings resulting in conviction, not in the sort of post-conviction, name-clearing hearing that respondent demands in this case.

Finally, to the extent that the State's decision to notify the public of *all* convicted sex offenders (without first conducting any individualized risk assessments) implicates a constitutionally protected interest, respondent's challenge to that determination is more suited to review under substantive rather than procedural due process. See *Michael H.* v. *Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion). But Connecticut's decision to notify communities of all registered sex offenders is clearly rationally related to legitimate state objectives, and therefore readily satisfies any substantive due process review. Indeed, experience shows that criminal history is the single best predictor of future criminal behavior, especially in the case of sex offenses. States such as Connecticut may reasonably conclude that individualized risk assessments are costly, cumbersome, and even unreliable. The Constitution does not require a State to conduct such individualized assessments before it may make a registry of convicted sex offenders available to its citizens.

ARGUMENT

A STATE MAY LIST CONVICTED SEX OFFENDERS IN A PUBLICLY AVAILABLE REGISTRY WITHOUT FIRST CONDUCTING INDIVIDUALIZED POST-CONVICTION RISK ASSESSMENTS

A. Respondent Has Not Been Deprived Of Any Interest Protected By The Fourteenth Amendment

In *Paul* v. *Davis*, 424 U.S. 693 (1976), this Court established the framework for determining whether a claim that state action has injured one's reputation triggers the procedural guarantee of the Fourteenth Amendment. Respondent has failed under that standard to identify the deprivation of any constitutionally

protected interest due to his inclusion in the State's sex offender registry.

1. *Paul* involved an individual, Davis, whose name and photograph were included on a police flyer of "Active Shoplifters," following his arrest—but not conviction—for shoplifting. 424 U.S. at 695. After the flyer was circulated to local merchants, the shoplifting charge was dismissed. *Id.* at 695-696. Davis then brought suit under 42 U.S.C. 1983 against the officers responsible for preparing and circulating the flyer, claiming that the flyer, and "in particular the phrase 'Active Shoplifters' appearing at the head of the page upon which his name and photograph appear[ed]," inflicted a stigma on his reputation that would "seriously impair his future employment opportunities," and thereby deprived him of a "'liberty' protected by the Fourteenth Amendment." *Id.* at 697.

This Court disagreed, and held that the interest in one's reputation, standing alone, is not protected by the Due Process Clause. See 424 U.S. at 711-712. The Court explained that the customary recourse for "the infliction by state officials of a 'stigma' to one's reputation" is state defamation law. *Id.* at 701. To trigger due process guarantees, an individual must show that he has been deprived of an interest that is "recognized and protected by state law." *Id.* at 710. That is, an individual must show that "*as a result of the state action complained of*, a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711 (emphasis added). Davis failed to make that showing, the Court held, because he did not "assert denial of any right vouchsafed to him by the State." *Id.* at 712.

In so holding, the Court in *Paul* contrasted the situation in *Wisconsin* v. *Constantineau*, 400 U.S. 433

(1971), where the Court concluded that the plaintiff *had* suffered a change in status under state law—due to an alleged harm to reputation—triggering due process. *Constantineau* involved a challenge to a state law that required the "posting" of the names of individuals deemed to pose a community risk by reason of "excessive drinking." *Id.* at 434-435. The law further made it unlawful for others to sell or give liquor to "posted" individuals. *Id.* at 434-435 n.2. As the Court explained in *Paul*, the "posting" at issue in *Constantineau* "significantly altered [an individual's] status as a matter of state law" by depriving him of "the right to purchase or obtain liquor in common with the rest of the citizenry," and "it was *that alteration of legal status* which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." 424 U.S. at 708-709 (emphasis added).

In *Siegert* v. *Gilley*, 500 U.S. 226 (1991), this Court reaffirmed the important constitutional principles established by *Paul*. See *id.* at 233-234. *Siegert* involved a claim brought by a former employee against a federal government employer under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on an allegedly defamatory letter sent by the former employer to a prospective employer. 500 U.S. at 228-229. In holding that the plaintiff failed to state a claim under the Fourteenth Amendment, the Court reiterated that "[d]efamation, by itself, is * * * not a constitutional deprivation," and concluded that, under *Paul*, the plaintiff had failed to state a claim, even though "[t]he statements contained in the letter would undoubtedly damage the reputation of one in his position, and impair his future employment prospects." *Id.* at 233-234.

2. Respondent's inclusion in Connecticut's sex offender registry and the resulting public notification of that fact does not remotely implicate the kind of interest required by this Court's precedents. It essentially provides the public with notice of the fact that an individual has been convicted of a crime triggering the registration requirements and related truthful information. Connecticut provides no additional commentary, but rather includes a disclaimer on its Internet website allowing members of the public to draw their own inferences from this information. See pp. 6-7, *supra*. The publication of such truthful information flowing from the fact of a prior conviction does not meaningfully implicate respondent's reputational interest, let alone deprive him of the kind of right or entitlement required by *Paul*.

Under *Paul*, respondent must show the material alteration in a state entitlement or right "as a result of the state action complained of." 424 U.S. at 711. In holding that respondent met that test, the Second Circuit pointed to the "registration duties imposed by Connecticut's sex offender law." Pet. App. A30. But that analysis confuses cause and effect. The "state action complained of" in this case is facilitating public awareness of respondent's inclusion in the State's sex offender registry, and the alleged stigma resulting therefrom. See *id.* at A18.[5] Registration is not a result

[5] Accordingly, the permanent injunction affirmed by the court of appeals below is "limited to public disclosure of the sexual offender registry." Pet. App. A13; see *id.* at A39 ("[I]t is the *communication to the public* of the fact that the plaintiff (and other members of the class) is in the registry, without a hearing as to the current danger that the plaintiff (and other member[s] of the class) poses, that is both central to the constitutional infirmity of the statute and the principal object of the injunction.") (emphasis added).

of—or a "plus factor" under *Paul* that flows from—such community notification. Registration, as respondent's complaint recognizes, is "solely" the result of one's conviction for a sex offense. See Br. in Opp. App. 2 ("[R]egistration is required solely on the basis of a conviction for one of the offenses listed in the statute.").

The effect on respondent—and alleged stigma—would be no different if the State notified the community of the fact of his conviction for a sex offense, rather than the fact of his registration as a sex offender. Indeed, under Connecticut's categorical approach, they are one and the same. In either case, respondent has not suffered any denial of a state right or entitlement (as required by *Paul*) as a result of such notification. Notification has not, for example, resulted in "loss of government employment," "loss of tax exemption," loss of a "right to purchase or obtain liquor in common with the rest of citizenry," loss of a driver's license, or loss of parole. *Paul*, 424 U.S. at 705, 708, 711. In short, like the plaintiff in *Paul*, respondent was not "deni[ed] * * * any right vouchsafed to him by the State" as a result of the complained of action, and he was not deprived of any interest protected by the Fourteenth Amendment. *Id.* at 712.

3. The Second Circuit held that *Paul*'s "plus factor" is met if a plaintiff "points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit." Pet. App. A29. But that is a substantial deviation from the requirements of *Paul*, and provides no limiting principle to prevent transforming simple defamation claims against

the State into constitutionalized defamation claims. Indeed, if the touchstone were simply "an indicium of material government involvement unique to the government's public role," then a State's public role in notifying the community that state officers have apprehended the person they believe "to be responsible for a particular crime in order to calm the fears of an aroused populace," not to mention a listing of those arrested for shoplifting, would give rise to "a claim against such officers under § 1983." *Paul*, 424 U.S. at 698. But *Paul* teaches that the contrary is true. See *id.* at 699 (noting that such consequences "would come as a great surprise to those who drafted" the Fourteenth Amendment).

In *Paul*, 424 U.S. at 701, the Court was careful to avoid any "reading" of the Due Process Clause that would make "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999) (discussing the "frequent admonition that the Due Process Clause is not merely a 'font of tort law.'") (quoting *Paul*, 424 U.S. at 701); *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986). As this case illustrates, the Second Circuit's amorphous "indicium of material government involvement" test would permit counsel to convert practically any defamation claim against the State into a Fourteenth Amendment claim suitable for federal adjudication pursuant to Section 1983. The Court should reject the Second Circuit's expansive, limitless, and unfounded reading of the Fourteenth Amendment and, instead, reaffirm the ground rules established by *Paul*.

B. Respondent Received Any Process That He Was Due When He Was Convicted Of His Sex Offense

Even assuming that the Second Circuit correctly concluded that respondent alleged the deprivation of a protected liberty interest, respondent received all the process that he was due when he was convicted of a sex offense.

1. This case is distinguishable from *Paul* in a fundamental respect that makes respondent's due process claim even more attenuated than the claim in *Paul*. The police flyer in *Paul* identified Davis as an "Active Shoplifter," even though he had only been *charged* with shoplifting when the flyer was distributed. 424 U.S. at 696. Justice Brennan emphasized that point in his dissent, stating that "[t]he stark fact is that the police here have officially imposed on respondent the stigmatizing label 'criminal' without the salutary and constitutionally mandated safeguards of a criminal trial." *Id.* at 718; see *id.* at 718-719 & n.5 (respondent was "never convicted of any criminal activity"). In his view, "[i]n the criminal justice system, [an individual's interest in his reputation] is given concrete protection through the presumption of innocence and the prohibition of state-imposed punishment unless the State can demonstrate beyond a reasonable doubt, at a public trial with the attendant constitutional safeguards, that a particular individual has engaged in proscribed criminal conduct." *Id.* at 724; see *id.* at 735 n.18 ("[T]he State may not condemn an individual as a criminal without following the mandates of the trial process.").

The logical corollary of that observation is that, as even the dissenters in *Paul* recognized, there is nothing constitutionally problematic about labeling someone as

a criminal if they have been convicted after receiving "the salutary and constitutionally mandated safeguards" of the criminal justice system. 424 U.S. at 718 (dissent). Such safeguards provide all the process that an individual is due before a State publishes information concerning the fact of his past criminal behavior, and individuals lack any constitutionally cognizable reputational interest in avoiding such publication.

Connecticut has not publicly identified respondent as a sex offender based on his *arrest* for a sex offense. Rather, respondent was listed on the State's registry based "solely" on the fact of his conviction of a sex offense. Pet. App. A9; see Br. in Opp. App. 2 (Complaint). In other words, unlike the plaintiff in *Paul*, respondent received the panoply of procedural protections guaranteed criminal defendants by the Constitution, see *Herrera* v. *Collins*, 506 U.S. 390, 398-399 (1993), and was *convicted* of a sex offense before he was listed on the State's sex offender registry.[6] Whatever stigma may stem from respondent's conviction of a sex offense, nothing in the Constitution prohibits the State from publicly recognizing the fact of that conviction by way of its sex offender registry—or entitles respondent to any additional hearing before it does so.

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[6] In addition to the procedural protections afforded individuals in the underlying criminal proceedings, convicted sex offenders may collaterally attack their convictions in state and federal habeas proceedings. The federal guidelines governing Megan's laws state that registration may be discontinued "if the underlying conviction is reversed, vacated, or set aside or if the registrant is pardoned." 64 Fed. Reg. at 573; see *id.* at 582-583 ("[I]f the underlying conviction is reversed, vacated, or set aside, or if the registrant is pardoned, registration (or continued registration) is not required under the [Wetterling] Act.").

2. Any stigma that could reasonably result from inclusion on a public sex offender registry such as Connecticut's stems from the fact of the individual's conviction for a sex offense. Indeed, the Internet website containing the registry at issue in this case explicitly stated: "Individuals included within the registry are included *solely by virtue of their conviction record and state law.*" Pet. App. A9 (emphasis added). Furthermore, far from labeling convicted sex offenders as "active" (like the flyer in *Paul*), the disclaimer stated: "The [State] has *not* considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made *no* determination that any individual included in the registry is currently dangerous." *Ibid.* (emphasis added).

The court of appeals nonetheless accepted respondent's assertion that Connecticut's sex offender registry not only truthfully discloses the fact of his prior conviction for a sex offense, but also *falsely* implies that he is a "presently dangerous sex offender." Pet. App. A15. Furthermore, the court held—after determining that respondent was deprived of a protected interest—that respondent was entitled to a hearing to determine whether he was "particularly likely to be currently dangerous before being labeled as such by [his] inclusion in a publicly disseminated registry." *Id.* at A39. That analysis is flawed under this Court's precedents.

Even when protected interests are at stake, the Fourteenth Amendment does not entitle individuals to a hearing to dispute an alleged stigma stemming from the publication of truthful information about them, or to clear their names. See *Codd* v. *Velger*, 429 U.S. 624, 627 (1977) (per curiam). In *Codd*, a New York City patrolman, Velger, brought a Section 1983 action challenging

his dismissal from the police force after his employer discovered from his personnel file that "he had put a revolver to his head in an apparent suicide attempt" during his training. *Id.* at 626. Velger argued that that information had a stigmatizing effect that would prevent him from securing future employment, and that he was entitled under the Fourteenth Amendment "to a hearing [on his dismissal] due to the stigmatizing effect of * * * material * * * in his personnel file." *Id.* at 625. The court of appeals agreed, emphasizing the stigmatizing effect of the material. See 525 F.2d 334, 336 (2d Cir. 1975) (The charge of attempted suicide "suggests to most of us such severe mental illness that it deprives one of the capacity to do any job well.").

This Court reversed. The Court explained that Velger had not "affirmatively asserted that the report of the apparent suicide attempt was substantially false." 429 U.S. at 627. The Court continued: "[T]he hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name.' If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him." *Id.* at 627-628.

So too here. Respondent does not dispute that he has been convicted of a sex offense. Even if he were deprived of a protected interest, he would not be entitled to a hearing to try to refute any alleged stigma flowing from the fact of his prior conviction, or his inclusion in the State's sex offender registry based "solely" on that conviction. Pet. App. A9; see *State* v. *Cook*, 700 N.E.2d 570, 579 (Ohio 1998) ("'The harsh consequences [of] classification and community notification come not as a direct result of the sexual offender law, but instead as a

direct societal consequence of [the offender's] past actions.'"), cert. denied, 525 U.S. 1182 (1999). That conclusion makes particular sense given that respondent has already had an opportunity to contest the fact that ultimately results in the alleged stigma. Unlike the report of a suicide attempt in a personnel file or an arrest for shoplifting, the fact of a criminal conviction is necessarily the product of a process in which the accused has had an opportunity to contest the government's view of the facts.

Under a contrary regime, a plaintiff could invariably identify some stigma on his reputation that allegedly flows from the State's dissemination of a truthful fact and—if he can show the deprivation of a protected interest—demand a hearing in federal court to try to dispel that *stigma*. There is no evidence whatever that the Framers of the Fourteenth Amendment intended to open the federal courts to such name-clearing hearings. Moreover, such a regime would require this Court to develop a set of constitutional rules to enable courts to discern which alleged stigmas (stemming from truthful facts) are of constitutional dimension, and which are not. Such fine and factbound distinctions are better left to the state law of defamation.

3. The *Codd* approach is particularly appropriate with respect to the government's dissemination of information—such as the fact of a criminal conviction—that is both of public record and of public concern. Indeed, in *Paul* itself the Court rejected the argument that the Constitution prevents a State from "publiciz[ing] a record of an official act such as an arrest." 424 U.S. at 713; see *Department of the Air Force* v. *Rose*, 425 U.S. 352, 389 (1976) (Rehnquist, J., dissenting) ("In [*Paul*] custodians of public records chose to disseminate them, and one of the subjects of the record claimed that

the Fourteenth Amendment to the United States Constitution prohibited the custodian from doing so.").

Similarly, in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975), the Court stated that it was "convinced" that a State could not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records." "Public records," the Court explained, "by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records." *Id.* at 495; see *Florida Star* v. *B.J.F.*, 491 U.S. 524, 532 (1989).[7]

In several cases, this Court has considered the extent to which the State may place restrictions on the ability of the press to publish truthful information in the public record. See, *e.g.*, *Butterworth* v. *Smith*, 494 U.S. 624 (1990); *Florida Star*, *supra*; *Cox Broad. Corp.*, *supra*; *Oklahoma Publ'g Co.* v. *Oklahoma County Dist. Court*, 430 U.S. 308 (1977). But the Court has never suggested that the Constitution compels the State *not* to disseminate truthful information in the public record, especially when, as here, that information pertains to a matter of public safety. To the contrary, the Court has recognized that States have discretion to determine when to disseminate such information. See *Florida Star*, 491 U.S. at 535; *Paul*, 424 U.S. at 713. Given the unique threat posed by sex offenders, States have an obvious—indeed, compelling—interest in making available the

[7] Criminal trials and convictions are a matter of quintessential public interest. See *Craig* v. *Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in a court room is public property."); *Cox Broad. Corp.*, 420 U.S. at 492-493.

sort of truthful, public record information at issue in this case. See pp. 2-3, *supra*.[8]

[8] To be sure, dissemination of even public record information may raise legitimate privacy concerns. Congress and the States have passed numerous laws protecting the confidentiality of information that is (or has been) in the public record, including criminal records. In *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), this Court held that federal "rap sheets" are exempt from disclosure under Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7)(C), which prevents the government from disclosing to others information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Citing this Court's decisions in *Paul* and *Cox Broadcasting*, however, the Court carefully distinguished between "the statutory meaning of privacy under the FOIA," at issue in *Reporters Committee*, and "the question whether an individual's interest in privacy is protected by the Constitution." 489 U.S. at 762 n.13. *Paul* and *Cox Broadcasting* establish that the Constitution does not prevent a State from disclosing arrest or conviction records. See pp. 21-22, *supra*; *National Fed'n of Fed. Employees* v. *Greenberg*, 983 F.2d 286, 294 (D.C. Cir. 1993) (*Paul* held in "the clearest possible terms that no constitutional right of privacy is violated by the disclosure 'of an official act such as an arrest'"); *Paul P.* v. *Verniero*, 170 F.3d 396, 403-404 (3d Cir. 1999) (same). In any event, this case does not present a claim of an invasion of any right to *privacy*. Respondent objects to the publication of the sex offender registry *without an individualized hearing* on his current dangerousness, not to publication of the registry *vel non*. Similarly, respondent has not challenged (on privacy or any other ground) the fact that Connecticut's sex offender registry includes the addresses and certain other identifying information with respect to those listed, see Br. in Opp. App. 20-21, and the court of appeals did not rely on the publication of such information in finding a due process violation. Instead, the court focused on the alleged stigma that it believed existed in being publicly listed as a convicted sex offender. Pet. App. A18.

C. Connecticut's Megan's Law Readily Satisfies Any Substantive Due Process Review

In many respects, respondent's objection to the State's public sex offender registry—both with respect to the requirement of registration and the resulting notification—sounds more in substantive than procedural due process. Traditionally, courts have analyzed and rejected challenges to the categorical operation of laws systematically imposing consequences based on a fact, such as a prior conviction, under principles of substantive due process. Respondent has avoided styling his claim in terms of substantive due process, presumably because of the high hurdle that any such claim would face, but this Court's cases clearly allow States to make rational legislative judgments based on the sort of categorical approach employed by Connecticut.

As the plurality recognized in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), States are not barred by principles of "*procedural* due process" from establishing a "conclusive presumption" or "general classification[]" that "foreclose[s] the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate." *Id.* at 120 (emphasis in original). Rather, such classifications, even when they implicate protected interests, are limited only by *substantive* due process. *Id.* at 120-121.

Michael H. involved a challenge brought by the putative natural father to a state law establishing a conclusive presumption that the husband of the mother who was living with the mother was the "father" of the mother's child. 491 U.S. at 116-118. The plurality rejected the putative father's procedural due process

argument that he was entitled to an "opportunity to demonstrate his paternity in an evidentiary hearing" before the State applied the rule to him, and terminated his parental rights. *Id.* at 119. Instead, the plurality reasoned that such a challenge "must ultimately be analyzed" under principles of substantive due process by looking to "the adequacy of the 'fit' between the classification and the policy that the classification serves." *Id.* at 121.[9]

Similarly, here, to the extent that the State's decision to notify the public of *all* registered sex offenders (without any individualized risk assessments) implicates any liberty interest enjoyed by respondent, that determination is, at best, limited by substantive due process. When, as here, a challenged classification does not infringe a fundamental right or discriminate against a suspect class, it is subject only to rational basis review, which looks deferentially to the "the 'fit' between the classification and the policy that the classification serves." *Michael H.*, 491 U.S. at 121. See *Washington* v. *Glucksberg*, 521 U.S. 702, 728 (1997); see also *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997) (states have "the widest latitude in drafting" civil remedial statutes); *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."). Connecticut's decision to notify communities of all registered sex offenders is clearly rationally related to legitimate state objectives and, thus, easily passes that check.

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[9] Justice Stevens, who concurred in the judgment in *Michael H.*, joined the portion of the plurality decision rejecting the procedural due process claim. See 491 U.S. at 132.

Megan's laws serve the vital government objectives of protecting the public from sex offenses and assisting law enforcement. See Pet. App. A17; see also *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."). The notification provision at issue in this case directly promotes those objectives. Indeed, experience teaches that the fact that an individual has been convicted of a sex offense is perhaps the most significant factor for gauging his risk of committing another sex offense upon his release. See *McKune* v. *Lile*, 122 S. Ct. at 2024; see also U.S. Sentencing Comm'n, *Report to the Congress: Sex Offenses Against Children* 34 (June 1996) ("The most consistent finding is that criminal history, especially a history of sexual offenses, is the most important and accurate predictor of the risk of future sexual offending."). The notification provision allows citizens and law enforcement to assess those risks accurately.

The Court has recognized that the government may take much greater steps based on the fact of a prior conviction. In *Lewis* v. *United States*, 445 U.S. 55, 66 (1980), for example, the Court held that "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." Indeed, as the Court noted in that case, "[t]his Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm." *Ibid.* (citing *Richardson* v. *Ramirez*, 418 U.S. 24 (1974) (voting); *De Veau* v. *Braisted*, 363 U.S. 144 (1960) (holding a union office); *Hawker* v. *New York*, 170 U.S. 189 (1898) (practicing medicine)). So too, a legislature may rationally conclude that a conviction for a sex

offense warrants registration and community notification with respect to that offense.[10]

At the same time, a State may reasonably conclude, as Connecticut has (Pet. 4-5), that attempting to assess the particular degree of danger posed by each convicted sex offender before providing community notification would prove "costly, cumbersome, and inaccurate." Cf. *Kansas* v. *Crane*, 122 S. Ct. 867, 870 (2002). Indeed, numerous States have passed Megan's laws adopting a categorical notification approach similar to Connecticut's,[11] the federal guidelines specifically permit that

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[10] The substantive due process claim in this case is particularly weak because the only consequence of any presumption in Connecticut's categorical approach is notification of "concededly true" (Pet. App. A15) information, leaving those who access the State's registry free to draw their own conclusions from that information. Following a categorical notification approach with respect to all registered sex offenders may encourage citizens to make their own judgments about the risks posed by particular sex offenders, without the imprimatur of a state determination that a particular offender poses a particular danger to his community based on the outcome of an individualized hearing.

[11] See, *e.g.*, Ala. Code §§ 15-20-25(b), 15-20-21(1) (2001); Alaska Admin. Code tit. 13, § 09.050(a) (2000); D.C. Code Ann. § 22-4001 (2001); Fla. Stat. Ann. §§ 943.043(1), 943.0435(1)(a) (West 2001); Ga. Code Ann. § 42-9-44.1 (1997); Haw. Rev. Stat. § 846E-3 (Supp. 2000) (invalidated in *State* v. *Bani*, 36 P.3d 1255 (Haw. 2001)); Ind. Code Ann. § 5-2-12-11(b) (Michie 2001); Kan. Stat. Ann. § 22-4909 (1995); Ky. Rev. Stat. Ann. § 17.580(1)-(2) (Michie Supp. 2001); La. Rev. Stat. Ann. § 15:546 (West Supp. 2002); 2001 Md. Laws 367 (to be codified at Md. Code Ann., Crim. P. § 11-717(b)); Mich. Comp. Laws Ann. § 28.728(2) (West Supp. 2002); Miss. Code Ann. § 45-33-49 (Supp. 2001); Mo. Ann. Rev. Stat. § 589.417(2) (West Supp. 2002); N.H. Legis. 241 (2002) (amending N.H. Rev. Stat. Ann. § 651-B:7(IV) (2001)); N.M. Stat. Ann. § 29-11A-5.1 (Michie 2000); N.C. Gen. Stat. § 14-208.15 (Supp. 1998); Okla. Stat. Ann. tit. 57, § 584(E) (West Supp. 2002); Or. Rev. Stat. § 181.592 (Supp.

approach, 64 Fed. Reg. at 582, and Congress itself has followed a similar path in the CSCPA. In any event, the determination whether to adopt a categorical or individualized notification approach with respect to convicted sex offenders is a policy judgment that the Constitution leaves to the State.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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(9)

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IN THE

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Petitioners,

v.

JOHN DOE, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE DISTRICT OF COLUMBIA AND THIRTY-FIVE STATES AND TERRITORIES IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires a State to offer a sex offender an individualized hearing on his current dangerousness before it may publicly disseminate information about his criminal convictions for sex offenses.

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BRIEF OF *AMICI CURIAE*, THE DISTRICT OF COLUMBIA, THIRTY-FIVE STATES AND TERRITORIES IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICI CURIAE*

This brief is submitted by the District of Columbia and by 35 states and territories in support of the petitioner, the Connecticut Department of Public Safety, and seeks reversal of *Doe v. Department of Public Safety*, 271 F.3d 38 (2d Cir. 2001). In that decision, the Second Circuit held that Connecticut's sex offender registration and notification law is unconstitutional on the ground that it violates the procedural component of the Due Process Clause of the Fourteenth Amendment. The Second Circuit ruled that Connecticut must give convicted sex offenders residing or working in the state a hearing on whether they are "currently dangerous" and likely to repeat their offenses before it may notify the public of their convictions.

Connecticut's law was enacted to conform to federal requirements set forth in the 1994 federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act; the 1996 federal Megan's Law; the 1996 Pam Lynchner Act; and the 1998 Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act. 42 U.S.C. § 14071. The Attorney General is directed to establish guidelines for state programs that require persons convicted of crimes against minors or crimes of sexual violence to register and provide their addresses and other information to state or local law enforcement officials and for public notification of the offenders. 42 U.S.C. § 14071(a)(1)(A). A state's failure to enact qualifying legislation could result in a ten per cent reduction in the state's share of crime prevention and law enforcement assistance funds under 42 U.S.C. § 3756. 42 U.S.C. § 14071(f).

The intent of both the federal and state legislation is to permit the monitoring of the whereabouts of convicted sex offenders; to facilitate the investigation of sex crimes; and to disseminate information about registered sex offenders to the public so they may take measures to protect themselves. An unusually large proportion of victims are children and juveniles. Notification deprives offenders of the anonymity and secrecy on which they depend for their crimes and permits citizens to protect themselves and their children from falling prey to the offenders.

All states and the District of Columbia have enacted sex offender registration laws to conform to these federal requirements. Connecticut adopted one of two major approaches to comply with federal requirements for sex offender registration, under which the requirements for registration and the extent of community notification are based exclusively on the nature of the offense committed by the offender. The other major approach, which the Second Circuit has held is constitutionally mandated, requires an individualized determination of current

dangerousness before a state may publicize a sexual offender's criminal convictions. A number of states and the District of Columbia have enacted registration laws like that of Connecticut. Other states have enacted hybrid statutes, under which the offender's offense alone (generally violent offenses or offenses against children) triggers the requirement of registration and the extent of public notification for more serious offenders, while individualized risk assessments are required for offenders who have committed other less serious offenses.

The laws of the states and of the District of Columbia which have provisions similar to those of Connecticut are subject to similar constitutional challenges.[1] For example, based in part on the lower court decision in this case, *Doe v. Lee*, 132 F.Supp.2d 57 (D.Conn. 2001), the public notification provisions of District of Columbia's sex offender registration act have and the Michigan act been held to be unconstitutional and their operation enjoined. *See Doe #1 v. Williams*, 167 F.Supp.2d 45 (D.D.C. 2001), *appeal pending sub nom., John Does, 1-5 v. Anthony A. Williams*, Nos. 01-7162, 01-5394, 01-7176 (D.C. Cir.) and *Daniel Fullmer v. Michigan Dept. of State Police*, 2002 U.S. Dist. LEXIS 10111 (E.D. Mich. 01-73319, June 3, 2002), *appeal pending, No. 02-1731 (6th Cir.)*.

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[1] States that employ individualized risk assessments in their sex offender registration programs also have an interest in this case. If the Second Circuit's decision stands, these states' risk-assessment mechanisms might be made subject to due-process scrutiny even in cases where the risk assessment leads to nothing more than public disclosure of the bare fact of the offender's conviction. Additionally, these states would be frozen into their current systems and could not change to an offense-based or hybrid system as the District of Columbia did just two years ago. Accordingly, the signatories of this brief include several states that employ individualized risk-assessment mechanisms.

SUMMARY OF ARGUMENT

Connecticut's sex offender notification law, similar to laws of twenty-four other states, has been held to be unconstitutional on the ground that it violates the procedural component of the Due Process Clause of the Fourteenth Amendment. The Second Circuit has held that Connecticut must give convicted sex offenders residing, working, or attending school in the state a hearing on whether "they are particularly likely to be currently dangerous" before it may provide the public with public record information relating to their convictions. 271 F.3d at 62. Although its decision rests on procedural grounds, the Second Circuit imposed a substantive limitation on the release of conviction records, because it is not possible to restructure the statutory scheme to avoid this limitation.

The Second Circuit misapplied *Paul v. Davis*, 424 U.S. 693 (1976), the decision on which it most heavily relied in striking down Connecticut's law. *Paul* dealt with the question of the extent to which a person has a constitutional claim against state or local officials for the release of false and defamatory information about him. The Second Circuit expanded *Paul* beyond its limits. Sexual offender notification provisions relate to the release of truthful, public-record information. The Connecticut sex offender registry consists only of information that is already of public record – namely criminal trials, required by the Sixth Amendment to be public, in which sex offenders included in the registry have been convicted of a sexual offense or otherwise adjudicated to have committed such an offense.

The Second Circuit did not find falsity in what Connecticut said but in the implication which can be drawn from reporting that an individual has been convicted of rape or some other serious sexual offense. (A. 17-18). The court ruled that the implication to be drawn from a system which reports such

convictions to the public, along with objective, verified identifying information, is the statement that the convict is currently dangerous. This implication can be drawn even though Connecticut included in its public notification the statement that it had made "no determination that any individual in the Registry is currently dangerous." (A. 9). It is a serious misreading of *Paul* to find falsity and defamation in the truthful report that a person has previously been convicted of a serious sexual offense. *Paul* does not require states to give a convict a hearing on whether he is "currently dangerous" before the public-record fact of a serious criminal conviction can be reported.

Any "stigma" or harm that resulted to the plaintiff's reputation was from the fact of conviction of a sexual offense and not from public notification of registry information. Plaintiff alone is responsible for any stigma resulting from his crime. To state a constitutional tort under *Paul*, plaintiff was required to show the existence of the "plus" factor — the material alteration of a state entitlement or right as a result of the public notification of his convictions. He failed to meet that burden. The requirement that he register as an offender and provide identifying information is no more burdensome than the requirement that a (presumably innocent) person who is arrested and charged provide such information. His showing in this regard is indistinguishable from that in *Paul*.

That Connecticut's notification scheme is consistent with constitutional requirements also necessarily follows from *Paul's* holding that there is no substantive right to prevent a state or local government from reporting the fact of an arrest. The Court rejected plaintiff's arguement that "the State may not publicize a record of an arrest," because of a "right of privacy" guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments. 424 U.S. at 712-14. The Court stated that "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." This reasoning

applies with much stronger force where, as here, the fact of a conviction, rather than a mere arrest, is publicized.

ARGUMENT

I. MANY STATES HAVE SEX OFFENDER REGISTRATION LAWS SIMILAR TO THE LAW AT ISSUE HERE.

All states and the District of Columbia have sex offender registration laws which conform to federal requirements designed to protect children and adults from known child molesters and known sexually violent offenders. The first federal statute to be enacted, as part of the 1994 federal crime bill, is the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which set national standards for state sex offender registration laws.[2] 42 U.S.C. § 14071. In 1996, the law was amended by the federal Megan's Law to require community notification of the identity of persons required to register.[3] 42 U.S.C. § 14071. The law was amended

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[2] The law was named for eleven-year-old Jacob Wetterling who was abducted at gunpoint by a masked man as he was returning home from a convenience store in St. Joseph, Minnesota, in 1989 and was never found. H.R. Rep. No. 392, 103d Con., 1st Sess. 3 (1993).

[3] The law was named for seven-year-old Megan Kanka, who was was raped and murdered by a neighbor in 1994. The neighbor enticed Megan into his home with an invitation to see his puppy and then raped and killed her. Megan's body was found several days later in a plastic bag in a nearby wooded area. The neighbor had previously been convicted twice of child molestation and moved into the house across from the Megan's upon his release from prison; he lived there with two other convicted sex offenders. Neither Megan's parents nor other neighbors knew anything about his history or that of the other occupants of the house. *See E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997).

again in 1996 by the Pam Lychner Sexual Offender Tracking and Identification Act. Among other things, this amendment directs the Federal Bureau of Investigation to establish a national database of sex offenders to assist law enforcement agencies in tracking sex offenders when they move from one state to another. 42 U.S.C. § 14072.

These federal laws and state laws implementing them were enacted in recognition that sex crimes are rampant and "[s]ex offenders are a serious threat in this nation." *McKune v. Lile*, slip op. at 5, 536 U.S. ___, 122 S.Ct. 2017, ____ (2002). Statistics compiled and studies done by the U.S Department of Justice, Bureau of Justice Statistics indicate that, in 1995, an estimated 355,000 rapes and assaults occurred nationwide; a majority of the victims of sexual assault are juveniles or children (nearly 40% of imprisoned violent sex offenders said their victims were 12 or younger); and convicted sex offenders are more likely than any other type of offender to be rearrested for a new offense.[4] Between 1980 and 1994, the population of

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[4] U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* 1 (1997); U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, p. 6 (1997); U.S. Dep't of Justice, Bureau of Justice Statistics, *Child Victimizers: Violent Offenders and Their Victims* 2 (1996); U.S. Dep't of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983 6 (1997); U. S. Dep't of Justice, Bureau of Justice Statistics, *National Conf. on Sex Offender Registries* (*National Conf.*) 93 (Apr. 1998); U. S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement* (*Young Children*) 2 (July 2000); U. S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* (*Recidivism*) 10,

imprisoned sex offenders increased at a faster rate than for any other category of violent crime.

In addition, many sex crimes are not reported to authorities. Nearly 70% of sex crimes and 90% of child molestation offenses go unreported. U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Victimization in the U.S.*, 1999 *Statistical Tables*, Table 93 (Jan. 2001); H.R. Rep. No. 392, 103rd Cong., 1st Sess. 4 (1993). The under-reporting is confirmed by empirical study. In a study of 561 non-incarcerated, self-reported sex offenders, the 126 offenders who had committed rape reported committing a total of 907 rapes on 882 different victims; men who targeted boys had an average of 150 victims, while men who targeted girls had an average of 19 victims. Gene G. Abel, *et al.*, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 3 J. Interpersonal Violence 3, 15-16 (1987); see also, *Panel Discussion*, 63 Fordham L. Rev. 125, 135-45 (1994). The statutes address these problems.

Federal law requires the Attorney General to establish guidelines for state programs to require persons convicted of crimes against minors or crimes of sexual violence to register and provide their addresses and other information to state or local law-enforcement officials. 42 U.S.C. § 14071(a)(1)(A).[5] A state's failure to enact qualifying legislation could result in a ten percent reduction in the state's share of crime prevention and law-enforcement assistance funds under 42 U.S.C. § 3756, known as the Edward Byrne Act. *See* 42 U.S.C. § 14071(f).

Table 11 (June 2002).

[5] In the event a state fails to establish a qualifying sexual offender registration system, sexual offenders in that state are required to register with the Federal Bureau of Investigation. 42 U.S.C. § 14072(c).

The law requires that state programs must include in their registries persons convicted of enumerated sexual and other criminal offenses against a minor, sexually violent offenses, and what the law defines as a "sexually violent predator." 42 U.S.C. § 14071(a)(1). The term "criminal offense against a victim who is a minor" includes kidnapping or false imprisonment of a minor, except by a parent; criminal sexual conduct toward a minor; solicitation of a minor to engage in sexual conduct or to practice prostitution; use of a minor in a sexual performance; or any criminal conduct that is a sexual offense against a minor; and attempts to commit any of these offenses. 42 U.S.C. § 14071(a)(3)(A).

A "sexually violent offense" is an offense which is comparable to "aggravated sexual abuse" or "sexual abuse" described in 18 U.S.C. §§ 2241 and 2241 or attempts to commit these offenses. 42 U.S.C. § 14071(a)(3)(B). "Aggravated sexual abuse" is an offense under which a person (1) "knowingly causes another person to engage in a sexual act" by force or by threat or by placing that person in fear of "death, serious bodily injury, or kidnapping;" or (2) engages in a sexual act after rendering the victim unconscious or by administering a drug or intoxicant that substantially impairs the ability of that person to appraise or control conduct. 18 U.S.C. § 2241. "Aggravated sexual abuse" is also defined as a sexual act with a child under 12 years of age or under 16 years of age if the perpetrator is at least four years older than the victim. *Id.* "Sexual abuse" is engaging in a sexual act by placing the person in fear other than fear of death, serious bodily injury, or kidnapping or engaging in a sexual act with a person "incapable of appraising the nature of the conduct" or "physically incapable" of declining participation or communicating unwillingness to engage in the sex act. 18 U.S.C. § 2242. A "sexually violent predator" is a person who has been convicted of a sexually violent offense and has a mental abnormality or personality disorder that makes the person likely

to engage in predatory sexually violent offenses. 42 U.S.C. § 14071(a)(3)(C).

The registration period is for life or for a minimum period of ten years. 42 U.S.C. § 14071(b)(6)(A) & (B). A person must register for life if (1) he has committed more than one registration offense; (2) he has committed an "aggravated" offense, like those described in 18 U.S.C. § 2241; or (3) he is a "sexually violent predator." 42 U.S.C. § 14071(b)(6)(B). Those convicted of other registration offenses must register for a period of 10 years. 42 U.S.C. § 14071(b)(6)(A). The states must collect specific information from registrants, including home and work addresses, fingerprints and a photograph. 42 U.S.C. § 14071(b)(1). Registrants must report changes of address, and state officials are required to verify registrant information at least annually. 42 U.S.C. § 14071(b)(1)&(3). States are required to obtain additional information from sexually violent predators, including identifying factors, anticipated future residence, offense history and any treatment received for mental abnormality or personality disorder and must verify information every 90 days. *Id.*

Federal law permits states to release information collected under their registration programs "for any purpose permitted under the laws of the State." 42 U.S.C. § 14071(e)(1). The guidelines mention the broad discretion that states have to release information, stating that "there is no requirement under the Act that registration information be treated as private or confidential to any greater degree than the state may wish." 62 Fed.Reg. 581 (Jan. 5, 1999). A state is required to release information to the community "that is necessary to protect the public concerning a specific person required to register under" the federal law. 42 U.S.C. § 14071(e)(2).[6]

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[6] The Department of Justice Guidelines suggest any one of three different approaches for community notification:

Connecticut, twenty-four other states, and the District of Columbia have all based community notification primarily on the nature of the offense committed by the offender rather than other characteristics of the offender or the use of individualized risk factors.[7] This type of notification flows from the Wetterling Act,

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> One type of approach ... involves particularized risk assessments of registered offenders, with differing degrees of information release based on the degree of risk. ...
>
> States also are free under the Act to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories. ...
>
> Another approach by which states can comply with the Act is to make information accessible to members of the public on request. This may be done, for example, by making registration lists open for inspection by the public, or by establishing procedures to provide information concerning the registration status of identified individuals in response to requests by members of the public. ...

64 Fed. Reg. 582.

[7] See Ala. Code §§ 15-20-25(b), 15-20-21(1); Alaska Stat. 18.65.087; Cal. Pen. Code § 290.4; Conn. Gen. Stat. Ann. §§ 54-257, 54-258 (West 2001); Tit. 11, Del. Code Ann. § 4121(e) (Supp. 2000); Fla. Stat. Ann. §§ 943.043(1) and 943.0435(1)(a) (West 2001); Ga. Code Ann. § 42-9-44.1 (1997); Haw. Rev. Stat.

because that is the approach Congress took in enacting the law. Except in dealing with sexually violent predators, the Wetterling Act is geared only to the nature of the offense committed by the offender.[8] It is undoubtedly the reason that Connecticut and other states have chosen this means for community notification. Congress also took this approach in its most recent sex offender law, requiring categorical disclosure of sex offenders enrolled in or employed at institutions of higher education. See Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601(b) and (c), 114 Stat. 1537, 1538 (to be codified at 20 U.S.C. § 1092(f)(1), and 42 U.S.C. § 14071(j)).

One practical consideration that supports Connecticut's choice is the difficulty that would sometimes exist in predicting whether an offender is "currently dangerous" following an individualized hearing. It is likely that very few offenders would

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§ 846E-3 (Supp. 2000); Ill. Rev. Stat. Ch. 730, paras. 152/115, /120(c); Ind. Code Ann. § 5-2-12-11(b) (Michie 2001); La. Rev. Stat. Ann. § 15:546; 2001 Md. Laws ch. 10, § 2 (revising Md. Crim. Proc. Code Ann. § 11-717(b)); Mich. Comp. Laws Ann. § 28.728(2) (West 2001); Miss. Code Ann. § 45-33-49 (Supp. 2001); Mo. Ann. Rev. Stat. § 589.417(2) (West Supp. 2002); N.M. Stat. Ann. § 29-11A-5.1 (Michie 2000); N.C. Gen. Stat. § 14-208.15 (1993); Okla. Stat. Ann. tit. 57, § 584(E) (West Supp. 2002); Or. Rev. Stat. § 181.592 (1999); S.C. Code Ann. Rev. § 23-3-490 (2002); Tenn. Code Ann. § 40-39-106(f) (1997); Tex. Crim. Pro. Code Ann. Art. 62.08 (West Supp. 2002); Utah Code Ann. § 77-27-21.5 (2001); Va. Code Ann. § 19.2-390.1(B-D) (Michie 2002); W. Va. Code § 15-12-2(h) (2000); and Wis. Stat. Ann. § 301.46(5n) (West Supp. 2000).

[8] Counsel for petitioners informed us that the Department of Justice granted Connecticut a waiver of the requirement that it include the category of "sexually violent predator" in its registration system.

cooperate in the hearing by fully disclosing their histories, thereby decreasing the reliability of a final decision as to dangerousness. This affects the reliability of a final decision as to dangerousness. *Cf., McKune v. Lile, supra*, slip op. at 5-7, 122 S.Ct. at ____ . In this regard, the Supreme Court of Connecticut, in a decision which may have influenced its legislature in enacting the statute at issue here noted that such predictions are considered by experts to be "tentative at best," and "frequently conceded" to be "unreliable." *State v. Putnoki*, 200 Conn. 208, 220, 510 A.2d 1329, 1335 (1986). It was therefore reasonable for the Connecticut legislature to choose to give truthful conviction information as to all sex offenders, rather than to attempt to establish who among them is "currently dangerous."[9]

II. *Paul v. Davis* Does Not Require a Hearing on Whether an Offender is Currently Dangerous Before Release of Public Record Information of His Convictions.

The central issue in this case is whether the Constitution prohibits governments from disseminating truthful conviction

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[9] It would appear to be more difficult to make a prediction of dangerousness under the notification statutes than under the civil commitment statutes. That is because civil commitment statutes apply only to a limited number of offenders where a state can prove the existence of a "mental abnormality" or "personality disorder" or mental illness coupled with dangerousness and lack of control. *Kansas v. Hendricks*, 521 U.S. 346, 356, 360 (1997); *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 869 (2002). The proof of such an abnormality, disorder, or mental illness often aids in the forecast of future dangerousness because of the known behavioral patterns of people with them. A much larger portion of the offender population has no such disorders or abnormalities and is subject only to the registration and notification statute.

information to the public from public records— judicial records — about the sex offenses committed by sex offenders. The collection and dissemination of that information is done pursuant to state laws, whose provisions conform to the requirements of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act and Megan's Law, as amended, 42 U.S.C. § 14071. The Second Circuit held that conviction information can be released to the public only if states first make a determination that the sex offenders are currently dangerous in the sense that they are likely to repeat their offenses.

The Second Circuit misconstrued *Paul v. Davis*, 424 U.S. 693 (1976), which is the decision on which it most heavily relied. In *Paul*, the Court held that the practice of a city police force of disseminating information regarding suspected shoplifters did not violate either the substantive or the procedural component of the Due Process Clause of the Fourteenth Amendment. *Paul* involved an "Active Shoplifters" offender list which was very similar in salient respects to the sex offender registry involved in this case. It had been maintained by the police department of the City of Louisville, Kentucky for fifteen years.[10] The principal difference is that only a conviction will suffice to place a sex offender on Connecticut's offender registry, while a mere arrest was sufficient in *Paul*.

The "Active Shoplifters" list had a cover memorandum and five pages of names with the pictures of those who had been arrested for or suspected of shoplifting. The memorandum provided, in part:

> The Chiefs of The Jefferson County and City of Louisville Police Departments, in an

[10] *See Davis v. Paul*, 505 F.2d 1180, 1181 n. 1 (6th Cir. 1974), *rev'd*, 424 U.S. 701 (1976).

> effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in the criminal field.
>
> This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.
>
> Only the photograph and name of the subject is shown on this flyer, if additional information is desired, please forward a request in writing .... [424 U.S. at 695]

Paul recognized a constitutional tort similar to defamation where a defamatory statement by government officials results in stigma-plus. Specifically, a plaintiff must demonstrate each of the following elements for the constitutional tort the Court recognized: (1) a statement which falsely defames the plaintiff; (2) the "Stigma Factor"— a serious harm to the plaintiff's reputation; and (3) the "Plus Factor" — a significant alteration or extinguishment of a right or status previously recognized by state law. 424 U.S. at 708, 710-12. The third factor differentiates a state law defamation claim from a constitutional tort. None of these elements of the cause of action is met here.

A. There is No False Defamatory Statement.

There is no false defamatory statement. In order to establish the first element of the *Paul* cause of action, a plaintiff must demonstrate that the statement made by government officials falsely harmed his reputation. Falsity is an element of every cause of action for defamation the Court has permitted to go forward under the First Amendment. *See Gertz v. Robert*

Welch, Inc., 418 U.S. 323, 347 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 152, 164 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 386-89 (1967); *New York Times v. Sullivan Co*, 376 U.S. 254 (1964). In the closely related legal doctrine relating to name clearing hearings under the Due Process Clause, a former government employee is not entitled to a hearing unless he asserts that the material in question is "substantially false." *Codd v. Velger*, 429 U.S. 624, 627-28 (1977) (*per curiam*).

Under its sex offender law, Connecticut has disseminated the true, public fact that offenders included in the registry were convicted or found not guilty by reason of insanity of designated sex offenses. Before anyone on the registry was convicted or found not guilty by reason of insanity of that sex offense, he had the extensive procedural protections afforded by the criminal justice system. At the end of that process, that person was adjudicated to be a "sex offender." Connecticut does nothing more than disseminate this adjudicated fact to the public. That is all of the process contemplated by *Paul*.

Congress and the state legislatures may disseminate information in furtherance of the goals of programs they establish. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995).[11] Sex offenders' criminal convictions may be published under this authority, because "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion); see also *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in a court room is public property."). These are

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[11] See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("[t]he inherent worth of ... speech ... does not depend upon the identity of its source, whether corporation, association, union or individual").

principles under which access to criminal proceedings and records have been granted and the right of publication recognized.

There is simply no basis on which a federal court may enjoin the publication of criminal convictions. The First Amendment guarantees the right to publish the name of the victim of a rape or other sex offense when it appears in the public record. Thus, in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), a newspaper published the name of a victim of a sexual assault after learning the name from a police report placed in the police department's pressroom. 491 U.S. at 527. This Court held that the First Amendment barred prosecution of the newspaper under a statute mading it unlawful to publish the name of the victim of a sexual offense, because the information was "truthful" and had been "lawfully obtained." *Id.*, at 534. See also *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (reversing California state court's closure of six weeks of voir dire of jury in a criminal case charging the defendant with rape and murder of a teenage girl); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (statute mandating closure of courtrooms during minor rape victims' testimony is unconstitutional); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (the government may not impose sanctions for the publication of the names of rape victims lawfully obtained from the public record).

Connecticut publishes identifying information for each offender, including the offender's name, home address, aliases, date of birth, criminal conviction information, place of employment, and a photograph. This information is necessary for the publication to serve its intended purpose, and differentiates the release of conviction records of individual offenders from the mere dissemination of crime statistics. Identifying information is plainly not falsely defamatory.

The Second Circuit did not find that the registry contained any false statement. Instead, it ruled the public dissemination of registry information implies that sexual offenders on the registry are currently dangerous. The finding of an implicit assertion of dangerousness is directly contrary to explicit statements which accompany the registry that Connecticut "has not considered or assessed the specific risk of reoffense with regard to any individual" registrant and that it "has made no determination that any individual in the Registry is currently dangerous."

The Second Circuit's decision to strike down the law is based on the apparent assumption that the general public does not understand such statements and cannot evaluate public record information. That assumption is contrary to the usual assumption in our jurisprudence that the public is capable of evaluating truthful information and that information from public records is in the public domain and can be disseminated. *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. 469, 492-97 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 386-88 (1967).

B. The "Stigma Factor" — The Publication Did Not Cause Serious Harm to the Plaintiff's Reputation.

The second element in *Paul* is not met, because harm to plaintiff's reputation is not caused by the publication of registration information. The source of any stigma is not the listing, but the commission of the sex offense for which the plaintiff was convicted in criminal proceedings where he was provided the procedural protections granted by the Constitution. Plaintiff alone is responsible for any stigma resulting from his crimes. The consequences do not result from the sex offender law but from the offender's convictions.

The stigma the Second Circuit found here did not result from what Connecticut said about the plaintiff but from his inclusion in a published register that included all other sex offenders in the state. He was treated the same as other sex

offenders in that truthful information about his convictions was published. Some of the offenders are conceded to be currently dangerous. The stigma he alleges resulted from the implication that he was also dangerous. That stigma was dispelled by the disclaimer that no determination as to current dangerousness had been made as to any of the listed offenders.

The idea that there can be defamation by implication as the Second Circuit found here must be rejected. Connecticut authorities determined in advance what information was to be collected from offenders and what was to be published. They collected objective, verifiable information that included only convictions and identifying information. They treated all offenders equally. The authorities also dispelled the very implication that plaintiffs sought to draw. There is no defamation by implication here.

C. The "Plus Factor" — There Was No Significant Alteration or Extinguishment of a Right or Status Previously Recognized by State Law.

The "plus factor" separates the constitutional cause of action recognized by *Paul* from an ordinary, common-law action for defamation. In order to state a constitutional cause of action under *Paul,* plaintiff was required to show the material alteration in a state entitlement or right as a result of the notification of his sex offender status. 424 U.S. at 711. In holding that plaintiff met that test, the Second Circuit pointed to the "registration duties imposed by Connecticut's sex offender law." Pet. App. A30.

The Second Circuit held that *Paul's* "plus factor" is met if a plaintiff "points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit." Pet. App. A29. It then held that the registration obligations imposed by Connecticut's SORA provided the necessary governmental involvement. This is a distinction

where there is little difference. In *Paul*, the plaintiff had been required to give virtually the same identifying information when he was arrested and charged that a sex offender gives when he registers, unless he was willing to be detained until the government obtained it independently. The *Paul* plaintiff could no more refuse to give that information than could a sex offender refuse under the Connecticut statute. In short, there will be "an indicium of governmental involvement" virtually anytime the government collects information which it later publishes. There will often be some element of compulsion. If that is sufficient to meet *Paul's* plus factor, it effectively overrules that decision.

III. The Second Circuit Imposed a Substantive Limitation on the Publication of Conviction Records in Violation of *Paul.*

The Second Circuit imposed a substantive limitation on the release of conviction records even though it rested its holding on procedural due process grounds. This contradicts a square holding in *Paul*.

The ruling that Connecticut makes an implicit statement that a sex offender is currently dangerous when it releases the offender's conviction record and, therefore, cannot release that information without first affording an offender a hearing on the question of current dangerousness is a substantive limitation on the public dissemination of a sex offender's criminal history. That is so, because Connecticut expressly stated that it had made no determination that any individual in the registry is currently dangerous.[12] Thus, the implicit statement that the Second Circuit

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[12] The statement that Connecticut makes with the release of record information is:

> The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry and has made no determination that any individual in the Registry is currently dangerous. (A. 9).

found Connecticut to have made is directly contrary to the explicit statement that accompanied release of the information.

The Second Circuit prohibits or limits the release of sex offender convictions unless Connecticut undertakes a risk assessment which concludes that a person poses a danger is made first, if the offender requests such an assessment. This showing approaches and may even exceed that necessary for the civil commitment of a sexual predator. *Kansas v. Crane*, 122 S.Ct. 867, 870 (2002) (To civilly commit, "there must be proof of serious difficulty in controlling behavior."); *Kansas v. Hendricks*, 521 U.S. 346 (1997). Connecticut was not attempting to civilly commit sex offenders here; it was merely publishing public record information relating to their convictions. There is a big difference.

Such a difference is recognized in the cases. In *Paul*, the plaintiff argued that "the State may not publicize a record of an arrest" where the charges against him had been dismissed, basing his argument on a "right of privacy" guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments. 424 U.S. at 712-714. The Court responded that "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." This reasoning applies with much stronger force where, as here, the fact of a conviction, rather than a mere arrest that did not result in a conviction, is publicized.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court held that a state may not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records

which are maintained in connection with a pubic prosecution and which themselves are open to public inspection." *Id.* at 491. I stated the broad principle that "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.* at 496. Thus, the rape victim could not be protected from having her name published when her name was taken from public records and court proceedings, in contravention of local statutes.[13]

The practical effect of the decision below is to prohibit the dissemination of the name of the rapist although his victim's name may be publicized. This result is wrong and should not stand. The "good" name and reputation of the rapist cannot receive constitutional protection where similar protections are denied his victim.

The Court based its decision in *Cox Broadcasting* on the fact that the information published was truthful and that it was already in the public domain on official court records. The Court stated:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public

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[13] In *Cox*, a broadcast reporter covered a criminal trial in Georgia in which the defendant was convicted of raping and murdering his victim. The reporter uncovered the name of the victim from court records, including the indictment. He broadcast the victim's name in violation of a Georgia statute, which made it a misdemeanor to broadcast or otherwise report "the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made." The victim's family obtained a civil, tort recovery based on a private action under the statute. The Supreme Court of Georgia held that the statute did not violate the First Amendment. 420 U.S. at 470-76.

> interest was thereby served. Public records by their very nature are of interest to those concerned with the administration of government .... In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official records open to public inspection.

420 U.S. at 493. The Court also noted that special protection is given to reports of judicial proceedings. *Id.* at 492-93, citing *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in a court room is public property.").

Under its sex offender statute, Connecticut merely disseminates the true, public fact that a person was convicted or found not guilty by reason of insanity of a designated sex offense. Before that person was convicted or found not guilty by reason of insanity of that sex offense, he had the extensive procedural protections afforded by our criminal justice system. At the end of that process, that person was adjudicated to be a "sex offender." The statute does nothing more than disseminate this adjudicated fact to the public.

CONCLUSION

The judgment of the Second Circuit should be reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES

CONNECTICUT DEPT. OF PUBLIC SAFETY, *ET AL.*,

Petitioners,

v.

JOHN DOE, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE, CENTER FOR THE COMMUNITY INTEREST, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prohibits a State from listing convicted sex offenders in a publicly accessible registry without first giving the convicted sex offenders individualized hearings on whether they are "currently dangerous" or attempting to sort the offenders into "tiers" based on predicted likelihood of recidivating.

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INTEREST OF AMICUS CURIAE[1]

The Center for Community Interest ("CCI"), formerly known as the American Alliance for Rights and Responsibilities, is a national nonprofit organization headquartered in New York City.[2] CCI's goal is to make our communities safe places to live and raise children and to make the public areas of our cities secure and inviting places for all people by helping to identify commonsense, balanced solutions to crime and quality-of-life problems. CCI also helps to defend those policies against legal attacks. CCI has successfully helped localities and civic groups across the country remove drug dealers from housing projects, pornography shops from neighborhoods, gangs from street corners, and guns from schools. CCI has also assisted in defending the legality and propriety of "Megan's Laws."

CCI has filed briefs in the United States Supreme Court and numerous federal and state courts defending commonsense positions on the above issues, and on other matters such as aggressive panhandling, gangs, drunk driving, and prostitution. CCI has also defended drug-related evictions, security searches in public housing, and tailored drug-testing

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[1] Letters of consent to the filing of this brief are being contemporaneously lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for the amicus state that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] CCI's Board of Directors and Board of Advisors include: William Bratton, former New York City police commissioner; Fr. George Clements, Mac Arthur Prize recipient and founder of *One Church-One Child*; Mary Ann Glendon, Harvard Law School professor; George Kelling, Rutgers University professor and co-author of *Fixing Broken Windows*; Henry Luce III, chairman of the Henry Luce Foundation; Richard Lyman, past president of Stanford University; and Ronald Truss, president of the Birmingham, Alabama chapter of the NAACP.

programs in public schools. CCI has been at the forefront of efforts to reform child abuse laws to emphasize the lives and safety of children rather than the "rights" of adults in cases of starvation, torture, sexual abuse, or other depraved conduct.

Laws providing access to sex offender information, such as Connecticut's version of Megan's Law, are important empowerment tools to help members of communities make their own informed decisions about how they want to protect themselves and their children against convicted sex offenders living and working in their midst. The decision of Connecticut and numerous other States to provide community access to such information — without claiming to have sorted those convicts into categories based on likelihood of reoffending, and with a forthright acknowledgment that no such predictions of future dangerousness have occurred — is sensible and straightforward. Studies have shown high rates of recidivism among sex offenders, and there is no dispute that victims of sexual offenses, both children and adults, suffer tremendous trauma from such crimes. Requiring multi-tiered sorting systems, as the judgment below would do, exposes victims of sex offenses to potentially having to testify about the traumatic harms they suffered in order to attempt what experts acknowledge is an elusive prediction of future dangerousness. Such a process would force victims to revisit and harmfully relive those traumatic events. While States are certainly free to opt for multi-tiered sex offender regimes — notwithstanding the substantial human and financial costs that they may entail — CCI believes that States also can constitutionally decide to provide community access to a single set of truthful sex offender information with the accompanying acknowledgment that no tiering based on likelihood of reoffending has been attempted.

STATEMENT OF THE CASE

Like all other States, Connecticut has enacted a version of "Megan's Law" under which persons convicted of certain criminal sex offenses are required to register with the State's Commissioner of Public Safety ("Commissioner" or "DPS") promptly upon release into the community. *See* Conn. Gen. Stat. §§ 54-250 to 54-261 (2001).[3] As acknowledged by both the Court of Appeals for the Second Circuit and the district court, Connecticut's sex offender registration law was enacted "in response to concerns 'regarding the harm to society caused by sex crimes and the relatively high rate of recidivism among sex offenders.'" *Doe v. Lee*, 132 F. Supp. 2d 57, 66–67 (D. Conn. 2001) (quoting *Roe v. Office of Adult Probation*, 125 F.3d 47, 48 (2d Cir. 1997), and citing *Connecticut v. Misiorski*, 738 A.2d 595, 601-02 (Conn. 1999)); *accord Doe v. Lee*, 271 F.3d 38, 41–42 & n.4 (2d Cir. 2001).

A. The Connecticut Sex Offender Registry System

Under Connecticut's sex offender registry system ("SORS"), all registrants must provide the following information to the DPS after their release: name, address, criminal history, fingerprints, a blood sample for DNA analysis, a photograph, and a description of particular identifying physical characteristics. If a registrant moves, he must inform the State of his new address within five days; if a registrant resides temporarily in another state, he must register with the responsible agency in that state and must comply with

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[3] These laws are called "Megan's Laws" because the first such law was passed by the State of New Jersey in response to outrage over the death of Megan Kanka, a 7-year old who was abducted, raped, and murdered in 1994 by a man who lived across the street from Megan's family. Prior to the murder no one — neither Megan, her family, members of the community, nor local police — was aware that the murderer had twice previously been convicted of sex offenses with young girls, nor was anyone aware that he was living with two other men who had also been convicted of sex offenses. *See, e.g., E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997).

whatever additional duties are imposed on sex offenders there. *See* Conn. Gen. Stat. §§ 54-250(3), 54-251(a), 54-252(a), 54-254(a). All registrants must comply with SORS's periodic address verification requirements, *see id.* § 54-257(c), and registrants must be photographed at least once every five years. *See id.* §§ 54-251(a), 54-252(a), 54-254(a), 54-257(d). Failure to comply with any of these requirements is a Class D felony. *See id.* §§ 54-251(e), 54-252(d), 54-253(c), 54-254(b). Connecticut's SORS applies to persons convicted of four categories of offenses, and the specific registration requirements differ, depending upon the type of crime for which the offender was convicted and the offender's criminal history. *See id.* §§ 54-250(2), (5), (11), (12), 54-251(a), 54-252(a), 54-254(a). The Commissioner may not elect to remove any individual offender from the Registry or exempt an offender from registration requirements.[4] *See Doe*, 132 F. Supp. 2d at 61.

Connecticut's SORS directs the Commissioner to compile this information in a central registry ("Registry") and to share the information with local, state, and federal law enforcement officials. *See id.* § 54-257(a). The Commissioner and local and state law enforcement officials are also to make the Registry information available to the public during normal business hours. *See id.* § 54-258(a)(1). The DPS is further directed to post this information on an Internet website and to

[4] Two classes of offenders are eligible for exemption from registration, upon a finding by a Connecticut court that "registration is not required for public safety": (a) anyone who was convicted of engaging, while 18 or younger, in sexual intercourse with a victim who was (1) more than two years younger than him or her and (2) between the ages of 13 and 15 at the time of the offense; and (b) anyone who was convicted of subjecting another person to sexual contact without consent. Conn. Gen. Stat. § 54-251(b) & (c). In addition, the Registry information of certain offenders may be restricted by court order to law enforcement personnel only. These offenders include persons convicted of, *inter alia*, sexual assault in a spousal or cohabiting relationship or any crime involving a victim under the age of 18 to whom the offender is related, if the court finds that publication is not required for public safety and would reveal the victim's identity. *Id.* § 54-255(a) & (b).

issue notice quarterly to media outlets in Connecticut about the availability and means of accessing the Registry. *See id.*

The district court correctly characterized Connecticut's SORS as an undifferentiated or single-tier classification system under which all sex offenders convicted or found not guilty by reason of insanity are included in the Registry. *Doe*, 132 F. Supp. 2d at 59–60 & n.3. The district court found on undisputed evidence that while the DPS has a procedure in place "to respond to challenges to the accuracy or completeness of" information contained in the Registry, "none of the agencies involved in the registration process . . . conducts any individualized assessment of the public safety threat posed by an individual when deciding whether he must register." *Id.* at 61.

Connecticut's "Sex Offender Registry" website became available on January 1, 1999, and during the first five months of operation, it was visited over three million times. *See Doe*, 271 F.3d at 44 n.14. Prior to the district court's ruling in this case, a visitor to the website could search by last name, by first letter of a last name, or by town or zip code, and could thereby access a web page containing the registrant's name, offense, current residence, physical description, and photograph. *See Doe*, 132 F. Supp. 2d at 61. Sometime between December 1998 and May 1999, Connecticut added the following express disclaimer to the website:

> The [DPS] has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any

> specific individual. Anyone who uses this information to injure, harass, or commit a criminal act against any person included in the registry . . . is subject to criminal prosecution.

Doe, 271 F.3d at 44-45. The Registry website also stated, "[t]his information is made available for the purpose of protecting the public." *Id.* at 45.

Connecticut's SORS was enacted to comply with federal regulations (64 Fed. Reg. 572 (1999)) issued to implement the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (the "Wetterling Act"), 42 U.S.C. § 14071 (1994 & Supp. V 1999). Under the Wetterling Act – which sets minimum or threshold standards for sex offender registration and notification regimes – States must "release relevant information . . . necessary to protect the public concerning a specific person required to register" under the Act. 42 U.S.C. § 14071(e)(2). Any State that fails to comply with the Act loses ten percent of federal grant monies it otherwise would receive. 42 U.S.C. § 14071(g)(2)(A).

The regulations expressly declare that States may "make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." 64 Fed. Reg. at 582. The regulations also allow States to have information-on-request notification systems, by which members of the public may view sex offender information. *See id.* In this regard, the regulations declare that States that have "information-on-request systems may make judgments about which registered offenders or classes of registered offenders should be covered and what information will be disclosed concerning these offenders." *Id.*

Connecticut's SORS, whose registration and community information access rules are based solely on the nature of

the crime(s) for which an offender has been convicted, is consistent with access systems maintained by numerous States and the District of Columbia. *See generally* Logan, *A Study in Actuarial Justice: Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 603 (2000) (stating that nineteen States have adopted systems without individualized risk assessments). Significantly, Connecticut's chosen regime is also consistent with the Campus Sex Crimes Prevention Act of 2000, which requires States to ensure community access to information about all registered sexual offenders enrolled in or employed by an institution of higher education, without regard to individualized risk determinations. *See* Publ. L. No. 106-386, § 1601, 114 Stat. 1537 (to be codified at 20 U.S.C. § 1092(f)(1) and 42 U.S.C. § 14071(j) (effective October 2002)).

B. The Constitutional Challenge Advanced Below

On February 22, 1999, Respondents John Doe and Sam Poe filed suit under 42 U.S.C. § 1983, alleging on behalf of themselves and others similarly situated that Connecticut's SORS violated their Fourteenth Amendment right to Due Process by denying them a constitutionally protected liberty interest without notice or meaningful opportunity to be heard. *See Doe*, 132 F. Supp. 2d at 62. Doe, a Connecticut SORS registrant who provided undisputedly accurate Registry information to the Commissioner, claimed as a factual matter that he was not "a dangerous sexual offender" and did not "pose a threat to the safety of the community." *Id.* Nonetheless, he contended, he had been stigmatized for purposes of Due Process protection because the State failed to provide him with an opportunity to challenge the "implied allegation" that he is a "dangerous sex offender." *Id.* Doe claimed that this allegation arises from the "undifferentiated nature" of the Registry itself, in which "dangerous and nondangerous registrants are grouped in a single classification" – that is, "sex offender" – and because the Registry provides no information with respect to any individual registrant's "dangerousness." *Id.* Doe also alleged that Connecticut's

SORS altered his legal status under the law, because the registration requirements imposed an extensive burden on his personal liberties, separate from the "'deleterious effects which flow directly from a sullied reputation.'" *Id.* at 65 (citation omitted).

C. The District Court's Ruling

The district court (Chatigny, J.) agreed with Respondents' contentions and granted summary judgment on the Due Process claim, "essentially because the undifferentiated nature of the registry stigmatizes nondangerous registrants by grouping them together with dangerous registrants." *Doe*, 132 F. Supp. 2d at 59.[5] The district court found that the State had not provided Respondents with a chance to challenge the stigma, "implied by" their inclusion in Connecticut's single-tiered Registry, that they were dangerous sex offenders. *Id.* at 62. The district court reasoned that "[t]he implied allegation . . . arises from the undifferentiated nature of the registry, in which dangerous and nondangerous registrants are grouped in a single classification and no information is provided regarding any registrant's dangerousness." *Id.*

Utilizing the "stigma plus" analysis derived from cases such as *Paul v. Davis*, 424 U.S. 693 (1976), the district judge concluded that the Respondents had indeed suffered "stigma, that is, . . . public opprobrium and damage to . . . reputation." *Id.* at 63 (internal quotation marks and citation omitted). The court reasoned:

> Despite the accuracy of the registry data concerning the plaintiff and the statement on the web site that no determination of any individual's dangerousness has been made, the registry suggests that plaintiff is currently dangerous. Specifically, the undifferentiated nature of the registry and the undisputed purposes of [Connecticut's SORS] make it reasonable for a viewer of the registry to conclude that any particular registrant is dangerous.
>
> * * * *
>
> While it is true . . . that the viewer has no reason to think the registrant is one of those who is dangerous, the viewer also has no reason to think the registrant is not dangerous. Because there is no classification system, the viewer has neither absolute nor relative information regarding the dangerousness of the registrant.

Id. at 63-64 (footnotes and internal citations omitted). As a result, the district court stated, "[b]y omitting to provide such relative information, Connecticut's system has the effect of falsely suggesting that nondangerous registrants are in fact dangerous." *Id.* at 64.

The district judge further concluded that SORS's requirements were sufficient to establish a material alteration of Respondents' legal status, beyond mere damage to their reputations, thereby satisfying the "plus" factors necessary to establish a Due Process violation in this context. *See Doe*, 132 F. Supp. 2d at 64–65 (citing cases, including *Paul v. Davis*, 424 U.S. 693 (1976)). Based on its finding that Connecticut did not provide any individualized means of determining a registrant's dangerousness before inclusion in the Registry, the district court held that non-dangerous sex offenders, such as Respondents claim to be, must be afforded an opportunity to be heard about their alleged non-dangerousness before the State deprives them of their liberty interest. *See id.* at 66.

In May 2001, the district judge entered a permanent injunction prohibiting Petitioners from "disclosing or dissemi-

[5] Plaintiffs also brought an *ex post facto* claim on the same facts, against which the district court ruled at summary judgment. That aspect of the district court's decision is not before this Court.

nating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class if the information identifies the class member as being included in the Registry," and from "identifying any member of the due process class as being included in the Registry." *Doe v. Lee*, No. 3:99 CV 314 (RNC), 2001 WL 536729, at *1 (D. Conn. May 17, 2001). The injunction does not prevent law enforcement agencies or officers from obtaining access to the Registry or using the information contained in it for law enforcement purposes. *Id.*

D. The Second Circuit's Affirmance

The Court of Appeals for the Second Circuit affirmed on the merits. *Doe v. Lee*, 271 F.3d 38 (2d Cir. 2001). Although it rejected certain aspects of the district court's Due Process analysis, the Second Circuit nonetheless concluded that Connecticut's single-tiered Registry necessarily and falsely implied that "persons listed . . . are particularly likely to be currently dangerous." *Id.* at 50.

The Second Circuit reasoned that an offender's inclusion in the Registry as a person "convicted of crimes characterized by the State as sexual offenses" "plainly" stigmatized the registrant, even though the statement was true as a matter of fact. *Id.* at 47. What makes the stigmatizing statement false, and therefore actionable in the court's view, is the inference that a registrant, by inclusion in Connecticut's single-tiered SORS, is a "'*presently dangerous* sex offender.'" *Id.* at 48 (emphasis in opinion) (quoting Respondents' brief).

The Second Circuit rejected the district court's conclusion that Connecticut's SORS "implies that every person listed therein is in fact dangerous." *Id.* at 48 (citing *Doe*, 132 F. Supp. 2d at 63). Because the Registry includes *all* sex offenders who have been convicted of covered crimes, the Second Circuit was unable to conclude that a viewer would understand the Registry "to say or imply that *all* of the registrants are in fact currently dangerous." *Id.* at 49 (emphasis in original).

Nonetheless, the Second Circuit found that the Registry was defamatory as to Plaintiff-Respondents because it implies that some registrants are dangerous and that each individual registrant is more likely than the average person to be currently dangerous. *See id.* at 48. In concluding that Connecticut's undifferentiated, single-tiered SORS violated Doe's Due Process rights, the Second Circuit reasoned:

> [D]isclosing the identity of persons who are currently a threat to public safety is the sole avowed and legitimate purpose of the registry. Even the disclaimer itself, by asserting that the DPS "has made no determination that any individual included in the Registry is currently dangerous," clearly implies that some may be. But the list is undifferentiated; it does not say which registrants are or may be currently dangerous and which are not.
>
> We think that it follows that publication of the registry implies that each person listed is more likely than the average person to be currently dangerous. That implication seems to us necessarily to flow from the State's choice of these particular individuals about whom to disseminate information, a record as to their sex offences, and information as to their current whereabouts. This implication stigmatizes every person listed on the registry.

Id. at 49.

The Second Circuit also concluded that the registration requirements imposed by Connecticut's SORS qualified as "plus factors" under the "stigma plus" test of *Paul v. Davis*, 424 U.S. 693 (1976). *See Doe*, 271 F.3d at 56-57. The Second Circuit held that Respondents were "entitled to the opportunity to have a hearing consistent with due process principles to determine whether or not they are particularly likely to be

currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry." *Id.* at 62.

The judgment of the Second Circuit was entered on October 19, 2001. Defendant-Petitioners timely filed a Petition for a Writ of Certiorari, which was granted on May 20, 2002.

SUMMARY OF ARGUMENT

Legislatures attempting to provide people with information about convicted sex offenders in their communities are confronted with substantial evidence of the following four propositions: (1) sex offenders recidivate at serious and elevated rates; (2) sex offenders inflict horrible damage on their victims, many of whom are children; (3) it can be difficult to confidently predict whether any given convicted sex offender will recidivate and, if so, when; and (4) there are substantial potential human and financial costs associated with trying to make individualized predictions, including the potential for victims of sex offenses to have to testify about those crimes. Given the evidence of those propositions, a State can rationally conclude that multi-tiered sex offender registries are flawed and that the better approach is to provide community access to a single set of accurate sex offender information with an accompanying acknowledgment that no tiering based on likelihood of reoffending has been attempted.

This type of single-tier sex offender information system conveys no false assertions, either express or implied, about registrants. Nothing in this Court's precedents supports the conclusion that an impliedly false assertion is created by the publication of concededly truthful information about individuals' criminal convictions, particularly where publication is accompanied by an express disclaimer making clear that no individualized assessment of dangerousness was done. The fallacy in the Second Circuit's conclusion to the contrary is made particularly clear by the fact that virtually all of the information in the Connecticut SORS is public information that constitutionally cannot be removed from the public

domain. At bottom, the lower courts' decisions reflect an unwarranted mistrust in the ability of ordinary Americans to rationally evaluate truthful information about sex offenders in their communities and make intelligent decisions based on it.

A State need not enact a multi-tiered sex offender notification system to comport with the Constitution. Rather, a State may adopt a single-tier information access system that allows community members to make decisions *for themselves* about what steps, if any, are appropriate in a given situation to protect themselves and their families.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS A LEGISLATIVE DECISION TO ENACT A SINGLE-TIER INFORMATION ACCESS SYSTEM

Appreciating the backdrop against which Connecticut legislates is useful in assessing the permissibility of single-tier sex offender information access mechanisms such as the one chosen by the State of Connecticut. This backdrop similarly exists for Congress, the District of Columbia, and the many other States that have adopted single-tier sex offender information access mechanisms in which all persons convicted of defined sexual crimes are included. As explained further below, there is substantial evidence from which a legislature can reasonably conclude that: (1) sex offenders recidivate at serious and elevated rates; (2) sex offenders seriously harm their victims, who often include children; (3) it is difficult to assess the likelihood of any particular sex offender recidivating; and (4) there are substantial potential human and financial costs presented by a multi-tiered sex offender system. Based on available information, a State can make the eminently sensible decision to adopt a single-tier sex offender information access system to help inform members of the public about convicted sex offenders living and working in their midst.

A. Sex Offenders Recidivate at Serious and Elevated Rates

Numerous courts have acknowledged the evidence of the high rate of recidivism for sex offenders. For example, in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), the New Jersey Supreme Court, in upholding New Jersey's version of Megan's Law, reviewed extensive evidence of elevated recidivism rates for sex offenders. That evidence indicated that "'[a]s a group, sex offenders are significantly more likely than other repeat offenders to reoffend with sex crimes or other violent crimes, and that tendency persists over time.'" *Id.* at 375 (quoting brief of State of New Jersey).

Poritz noted various studies conducted by State and federal authorities, including a fifteen-year follow-up study of sex offenders in California in which 19.7% of sex offenders were rearrested for a subsequent sexual offense and in which "'[s]ex offenders were five times as likely as other violent offenders, and more than six times as likely as all types of offenders, to reoffend with a sex offense.'" *Id.* The evidence also included a review of "'the most frequently cited studies of sex offender recidivism,'" which indicated that rapists repeat their offenses at rates up to 35% and child molesters repeat their offenses at rates up to 29-40%. *Id.* The *Poritz* Court aptly stated that there was "no dispute," as far as the people of New Jersey were concerned, that "the relative recidivism rate of sex offenders is high compared to other offenders." *Id.* at 374 n.1. *Accord, e.g., Cutshall v. Sundquist*, 193 F.3d 466, 476 (6th Cir. 1999) (rejecting various constitutional attacks to Tennessee's "Megan's Law" and recognizing studies indicating that "sexual offenders have high rates of recidivism"); *Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997) (quoting findings of the New York legislature concerning "the danger of recidivism posed by sex offenders"); *Lanni v. Engler*, 994 F. Supp. 849, 853 (E.D. Mich. 1998) (rejecting various constitutional attacks, including a Due Process attack, to Michigan's "Megan's Law," and noting that sex offenders "by

virtue of relatively high recidivism rates" "pose a serious threat to society").

There is also a substantial body of scholarly literature discussing the serious rate of recidivism for sex offenders. For example, a 1995 article reviewing twelve studies of sexual offenders concluded that the average recidivism rate was 27% for those who did not receive treatment and 19% for those who did receive treatment. *See* Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. Consulting & Clinical Psychol. 802, 806 (1995) (collecting studies). Another study conducted in Massachusetts in 1997 found that 26% of rapists committed new sexual offenses within twenty-five years (with an average of 4.55 years before reoffense), and that 32% of child molesters recidivated (with an average of 3.64 years before reoffense). *See* Prentsky, *et al.*, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635, 642-43 (1997). A 1991 review of recidivism studies likewise found recidivism rates of 20-40% for exhibitionists and up to 35.6% for rapists. *See* McGrath, *Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, 35 Int'l J. Offender Therapy & Comp. Criminology 328, 334 (1991) (citing studies).

To be sure, and as courts have acknowledged, the scholarly literature concerning sex offender recidivism is not uniform and presents some conflicting opinions, "especially concerning the precise numbers" regarding recidivism rates. *Poritz*, 662 A.2d at 374 n.1; *accord* United States Sentencing Commission, *Report to the Congress: Sex Offenses Against Children* 32 (June 1996) (noting variation). But such variation in data does not limit legislatures; indeed, "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting statutes." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997).

In choosing to enact Connecticut's single-tier sex

offender information access regime, it is clear that the legislative representatives of the people of Connecticut were acting "in response to concerns regarding . . . the relatively high rate of recidivism among sex offenders." *Doe v. Lee*, 132 F. Supp. 2d 57, 66-67 (D. Conn. 2001) (internal quotation marks and citations omitted); *accord, e.g., Roe v. Adult Probation*, 125 F.3d 47, 48 (2d Cir. 1997) (stating that Connecticut enacted its version of Megan's Law in response to concerns about "the relatively high rate of recidivism among sex offenders"). There is ample authority upon which Connecticut could determine that the serious rate of recidivism presented by convicted sex offenders requires that people have access to information about these offenders in their communities. Access to information is necessary so that individuals can decide for themselves what precautions, if any, are appropriate to protect themselves, their spouses, and their children against undue risk of criminal sexual misconduct.

B. Sex Offenders Seriously Harm Their Victims, Who Often Include Children

It goes almost without saying that sex offenders inflict horrific damage upon their direct victims — most of whom are women and children -- and against society as a whole. The original Megan's Law was enacted to try to prevent such damage, *see Poritz*, 662 A.2d at 374 n.1, as was the Connecticut sex offender notification regime at issue in this case, *see Roe*, 125 F.3d at 48. Studies have estimated that "[b]etween 1 in 10 and 1 in 4 adult women are raped or sexually assaulted during adulthood and prevalence figures are similar for child victims of sexual aggression." Hall, 63 J. Consulting & Clinical Psychol. at 802 (citations omitted); *see also* Hanson and Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. Consulting & Clinical Psychol. 348, 348 (1998) (citing studies estimating that 10% of boys and 20% of girls suffer from sexual assault). Victims of sexual molestation and assault suffer physical, psychological, and emotional damage that can be debilitating and that can remain with

them the remainder of their lives.

C. A Legislature Can Reasonably Conclude That It is Difficult to Assess the Likelihood of a Sex Offender Recidivating

There is a considerable body of evidence and opinion attesting to the difficulty of accurately predicting whether any particular sex offender will commit another sex offense in the future. For example, the Connecticut Supreme Court has recognized that "predictions of future dangerousness are tentative at best and are frequently conceded, even within the profession, to be unreliable." *Connecticut v. Putnoki*, 510 A.2d 1329, 1335 (Conn. 1986). Numerous studies have led one commentator to conclude that "[p]redicting risk to commit violence in general and sexual aggression in particular is an extremely difficult task." McGrath, 35 Int'l J. Offender Therapy & Comp. Criminology at 331 (collecting studies).

Part of the reason for the difficulty in accurately assessing the future dangerousness of a particular offender is that factors which affect dangerousness can vary over time and can meaningfully impact the degree of dangerousness an offender presents. For example, studies have found that repeat sex offenses correlate with variables such as whether the offender was consuming alcohol. *See id.* at 338 (citing research finding that 45% of rapists reported a connection between alcohol use and increased urges to rape, and that 30% of child molesters reported that alcohol increased their sexual attraction to children). Research also has found that an offender is more likely to recidivate if he is currently unemployed or has been drifting between jobs as opposed to being in a stable employment situation. *Id.* at 340. Studies also indicate that an offender who does not presently have a stable family or other support network may be at higher risk to commit another sex offense. *Id.*; *see also* American Psychiatric Ass'n, *Clinical Aspects of the Violent Individual* at 25 (1974) ("[D]angerousness is an attribute not only of persons but of

situations and environmental factors"). In addition, while offenders who truly accept responsibility for their offenses and want to change their behavior should present lower risk profiles, "[m]otivation to change is difficult to assess, . . . because there are clear benefits to 'appearing' willing to change, and many sexual offenders have the social skills necessary to gain the confidence of sympathetic clinicians." Hanson and Bussière, 66 J. Consulting & Clinical Psychol. at 349.

As a result of the difficulties in trying to measure the danger of recidivism presented by any particular offender at any particular time, a legislature can reasonably conclude that making predictions about relative dangerousness levels, within the universe of convicted sex offenders being released into the community, is a risky and elusive endeavor. A legislature similarly can conclude that requiring a multi-tiered sorting of sex offenders based on predictions of likely recidivism may have the unintended effect of presenting the public with a more limited, and less accurate, set of information than a uniform access system that contains accurate sex offender information with an accompanying acknowledgment that no tiering based on likelihood of reoffending has been attempted.

D. <u>There Are Substantial Potential Human and Financial Costs Attendant to a Multi-Tiered Sex Offender System</u>

There also are substantial potential human and financial costs associated with having a multi-tiered sex offender system. Tragically, some of these costs may be imposed on *prior victims* of sex offenses, who frequently are the only witnesses who can provide direct evidence concerning factors that will be used in attempting the elusive "sorting" process discussed immediately above.

Through the "sorting" process, victims of prior sex offenses (including violent rape and child molestation) will be exposed to the possibility of testifying because virtually any

multi-tiered system will look to the circumstances and facts concerning past sex offenses to try to predict future dangerousness. Of course, "[m]any of these facts will not have been determined by the trier of fact in the criminal proceeding," *E.B. v. Verniero* 119 F.3d 1077, 1108 (3d Cir. 1997), because a jury verdict, and even a plea colloquy, likely addressed only the elements of the crime of conviction. As a result, a prior conviction may be of limited utility, particularly where the sex offender was allowed to plead to a less serious charge so as to spare his victim from having to testify at trial. In this situation, the plea colloquy will likely have focused on the elements of the *less serious* charge. In fact, defense counsel may have insisted that the plea colloquy focus entirely on the elements of the lesser charge (as opposed to the more gruesome aspects of the bargained-away crime) as part of the deal that spared the victim from having to testify. *See generally In re C.A.*, 679 A.2d 1153, 1165 (N.J. 1996) (suggesting that "in the future" prosecutors should try to "ensure that the factual basis of the [other] sexual offenses that are dropped pursuant to the plea bargain are established by reliable evidence").

Likewise, a multi-tiered system almost certainly will look to whether the convicted sex offender has engaged in other sexual misconduct which was not the subject of criminal conviction. As a result, in attempting to undertake a multi-tiered sorting process, "the court will be called upon in some proceedings to determine the circumstances of sex offenses that have never been the subject of a criminal proceeding" at all. *Verniero*, 119 F.3d at 1108.

Simply put, in multi-tiered registration systems, there are many factors that go into the "sorting" process that may potentially involve factual issues about which the victim of the crime is the best source of evidence. As to the crime of conviction, these issues include: (1) the degree of force used by the offender; (2) the duration of offensive behavior; (3) the degree of contact between the offender and the victim; and (4) whether the offense involved the use of, *inter alia*, a weapon.

See id. at 1083-84 (reviewing various factors employed in New Jersey's multi-tiered system); *accord Doe v. Pataki*, 120 F.3d 1263, 1268 n.6 (2d Cir. 1997) (identifying similar factors used in New York's multi-tiered system). To the extent the multi-tiered sorting addresses whether the convicted sex offender has committed other offenses beyond the crime of conviction, the number of factors about which the victim (or *victims*) will be the best source of evidence simply multiplies.

With a multi-tiered system, victims of crimes sometimes will be required to testify because "[s]ex offenses are almost always committed in private. This means that potential witnesses with relevant knowledge of whether, and if so how, an alleged sex offense occurred are generally limited to the victim and the alleged offender." *Verniero*, 119 F.3d at 1108. To be sure, States with multi-tiered registration systems have tried to take steps to minimize the number of times that victims will actually be required to testify at sex offender hearings by allowing for the possible use of certain hearsay — for example, permitting consideration of out-of-court "statements [that were previously] subject to cross-examination, or other statements where circumstantial guarantees of trustworthiness exist." *In re C.A.*, 679 A.2d at 1165 (internal quotation marks and citations omitted).

Nonetheless, a State like Connecticut can reasonably conclude that the possibility of easing burdens on victim-witnesses through the potential use of certain hearsay is insufficient to warrant a multi-tiered sex offender system. In New Jersey, for example, a multi-tiered state, hearsay evidence is admitted only under certain circumstances. Although it can be used to establish a *prima facie* case for the prosecution in favor of an offender's classification in a higher tier, the sex offender may challenge the hearsay with his own reliable hearsay, or with an offer of live testimony, and that can be sufficient to raise a factual issue that needs to be resolved by a hearing. *See id.* at 1164-65. In such an instance, the prosecution is not *required* to advance victim-testimony in rebuttal,

and instead may choose to take its chances with its other evidence. *See id. at* 1166. The prosecution obviously does so at its peril given the factual dispute in play.

Moreover, the *potential* of needing to present victim testimony itself will inflict trauma on the victim because of the need to prepare the victim-witness. Specifically, the State's decision about whether to impose on a victim to testify may well be presented only after the court concludes that the "State's hearsay evidence . . . [was] sufficient to overcome live testimony [just] offered on behalf of the offender." *Id.* Thus, the State in a multi-tiered system may well have been required to inflict upon a victim the trauma of preparing to testify and thereby re-living the crime. This trauma will be imposed, regardless of whether the victim ultimately needs to testify in court, just to try to support classification of the convicted sex offender in a "tier" that will allow notification to the community of the offender's presence.[6] A State like Connecticut can naturally be skeptical of the wisdom of such a "sorting" endeavor.

Over and above these potential human costs — which in and of themselves could reasonably lead a State to conclude that a multi-tiered sorting process presents human costs that cannot be justified — there are also potentially significant financial expenditures associated with the multi-tiered sorting

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[6] New Jersey courts have certainly expressed reluctance to "compel a victim to testify unless it is absolutely necessary," and have even at times stated that such victim testimony will be compelled in "the rarest of cases." *In re C.A.*, 679 A.2d at 1166. Nonetheless, the decision about whether a victim will be compelled to testify is subject to the discretion of the trial court, *id.* at 1164-65, and victims may feel morally obliged, even if not compelled by pain of law, to testify (and thereby re-live their harms), so that others can be informed of and thereby protected from the sex offenders who harmed them. This moral pressure likely will be felt by a victim in direct proportion to the degree of trauma inflicted by the convicted sex offender. The multi-tiered sorting process creates these pressures on a victim to testify, even if he or she is not compelled by law to do so.

process. For example, Massachusetts estimated in 1999 that the annual operating budget for its sex offender registry board, which sorts sex offenders into tiers, would be $10 million. *See* Logan, 3 Buff. Crim. L. Rev. at 636 n.206. There are substantial financial costs associated with the "sorting" process for any offender and, of course, a sex offender can demand new hearings (sometimes as frequently as once a year) by asserting that he is "all better now" and no longer presents a threat. *See, e.g.*, N.Y. Correct. Law § 168-o (McKinney 2002) (providing for annual hearings if so requested by registrant).[7]

In the present environment of dramatically shrinking state budgets, a State like Connecticut can reasonably conclude that limited public funds can be spent on more appropriate things – such as education, healthcare for the poor, or combating domestic terrorism – than the funding of a multi-tiered sorting process for convicted sex offenders. So can Congress, in its treatment of information access in the Campus Sex Crimes Prevention Act of 2000, and the District of Columbia and many other States that have similarly opted against multi-tier sex offender registration regimes in favor of regimes where all those who have been convicted are included. The reasonableness of such a decision is particularly apparent given the evidence that the multi-tiered sorting process may not be entirely effective, and given that there is a much simpler alternative – namely, providing a single-tier sex offender information access system that contains truthful information about offenders and expressly states that no tiering based on likelihood of reoffending has been attempted.

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[7] Studies demonstrate that sex recidivists sometimes commit reoffenses many years and even decades after their initial offense. *See, e.g, Poritz*, 662 A.2d 367, 374 n.1 (N.J. 1995); Prentsky, 21 Law & Hum. Behav. at 652; *see also id.* at 645-53.

II. THE SECOND CIRCUIT ERRED IN CONCLUDING THAT CONNECTICUT'S SINGLE-TIER REGIME IS UNCONSTITUTIONAL

The lower courts' decisions finding the Connecticut SORS unconstitutional fundamentally rest on the premise that "the undifferentiated nature of the [Connecticut] registry" creates an "implied allegation" that falsely stigmatizes convicted sex offenders like Respondents who claim that they are not "dangerous sex offender[s]." *Doe*, 132 F. Supp. 2d at 62; *accord Doe*, 271 F.3d at 49. The Second Circuit further stated that this "implication seems to us necessarily to flow from the State's choice of these particular individuals about whom to disseminate information, a record as to their sex offences, and information as to their current whereabouts." *Id.*

A. The Lower Courts' "Implied Allegation" Analysis Is Incorrect

The lower courts' "implied allegation" and false stigma analysis is fatally flawed. The Supreme Court's jurisprudence does not support a conclusion that a constitutionally objectionable defamation can be produced by the publication of *indisputably accurate* information such as that conveyed on the Connecticut SORS. There is no dispute in this case that the information actually published about the Respondents is accurate. *See Doe*, 132 F. Supp. 2d at 62-63. There is also no dispute that the Connecticut SORS contained an express disclaimer stating that the State had not made any "'determination that any individual included in the registry is currently dangerous.'" *Doe*, 271 F.3d at 44 (quoting DPS website). There is also no dispute that the website expressly advised that the State had "'not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry,'" and further clarified, lest there be any doubt, that "'[i]ndividuals included within the registry are included solely by virtue of their conviction record and state law.'" *Id.* (quoting disclaimer on DPS website).

Under such circumstances, it is not possible to conjure any false message about Respondents. The lower courts' attempt to do so is fundamentally inconsistent with the website's disclaimer, and nothing in this Court's precedents supports such a result. To the extent that the lower courts tried to find support in *Paul v. Davis*, 424 U.S. 693 (1976), they turned the case on its head. *Paul* rejected the claim that a plaintiff had a right to a due process hearing to vindicate an asserted liberty interest. *Id.* at 694. In *Paul*, the plaintiff asserted that this liberty interest was implicated by his inclusion on a list of "Active Shoplifters" publicly distributed by police, notwithstanding that he merely had been arrested and the charge against him thereafter was "filed away with leave (to reinstate), a disposition which left the charge outstanding" and unresolved. *Id.* at 696 (quotations omitted).

In the course of rejecting the various constitutional claims, *Paul* dismissed the proposition that "the State may not publicize a record of an official act such as an arrest." *Id.* at 713. This statement echoed a similar one made by the *Paul* Court in rejecting the plaintiff's Fourteenth Amendment challenge, in which the Court stated that if the plaintiff's view were to prevail, "a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime . . . presumably obtains a claim against such officers under [Section] 1983." *Id.* at 698. The Court's rejection of this due process proposition fatally undermines Respondents' allegation of a liberty interest in the context of this case, where the Respondents already have been *convicted* of sex offenses and the State has merely published information relating to those convictions (as well as an express disclaimer of any assessment of individual dangerousness).

Given the disclaimer on the Connecticut website, there is no way to find any implied false message about the Respondents. To the extent any specific message is conveyed about Respondents at all, it is that they are members of a group (*i.e.*, convicted sex offenders) that presents a risk of inflicting

serious harm on future victims. If such a message is conveyed – notwithstanding the SORS's statement that "'the main purpose of providing this data on the Internet is to make the information more easily available and accessible,'" *Doe*, 71 F.3d at 44 (quoting website) – that message is unquestionably *true*. Nothing false is either expressly or impliedly at play. As a result, there is no need to have any individualized hearing to determine the truth of the matters on the DPS website. *See Codd v. Velger*, 429 U.S. 624, 627 (1977) (holding that plaintiff has no due process right to any individualized hearing where he did not allege that information was "substantially false," notwithstanding plaintiff's stigma allegation).[8]

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[8] In addition, a subsidiary part of the Second Circuit's reasoning was its notion that the false "implication" purportedly created by the Connecticut SORS "*necessarily*" flowed "*from the State's choice of these particular individuals about whom to disseminate information*, a record as to the their sex offences, and information as to their current whereabouts." *Doe*, 271 F.3d at 49 (emphases added). This notion of improperly choosing "these particular individuals" (*i.e.*, only sex offenders) is more fairly likened to an equal protection analysis than a due process one, and it is fundamentally flawed. This Court has squarely held that legislative classifications based on the nature of criminal offenses are subject only to rational basis review. *See Chapman v. United States*, 500 U.S. 453, 465 (1991). And under rational basis review, it is well settled that a legislature may proceed incrementally in addressing problems. *See, e.g., Williamson v. Lee Optical of Oklahoma, Inc.* 348 U.S. 483, 488-89 (1955). Given available evidence, a State certainly can rationally conclude that the danger posed by sex offender recidivism warrants certain measures that are not needed to address recidivism from those who commit other offenses such as property crimes. *Accord Artway v. Attorney Gen'l of N.J.*, 81 F.3d 1235, 1267 (3d Cir. 1996) (holding that sex offenders are not a suspect class under Fourteenth Amendment analysis). Moreover, a legislature may adopt a conclusive presumption that each member of the group of convicted sex offenders presents a sufficient risk of recidivating to justify community access to sex offender information, without affording an individualized hearing concerning dangerousness, and not run afoul of any "substantive" due process prohibition. *See Michael H. v. Gerald D.*, 491 U.S. 110, 120-21 (1989) (plurality opinion). A legislative decision to enact such a conclusive presumption is subject only to rational basis review, which is satisfied given the danger of sex offender recidivism

(continued...)

B. The Information Provided By Connecticut's Single-Tier Information Access System Is Almost Entirely Public Information Anyway

The fallacy of the "implied stigma" argument is made even clearer by the fact that virtually all of the information available in a single-tier system concerning sex offenders is undeniably public information. In fact, information about the arrest and conviction of sex offenders, like information about most criminal proceedings, *must* be public and *cannot* be taken from the public domain. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (holding that the First Amendment prohibits States from imposing sanctions on the press publishing truthful information contained in court records). Information about "the commission of crime" and the results of "prosecutions resulting from it" are "without question events of legitimate concern to the public." *Id.* at 492.

These issues are of legitimate public concern for many reasons. One is the public's right to know of individuals and businesses that have been convicted of crimes so that citizens can protect themselves – in their business affairs, in their investments, and in their personal interactions with convicts who present the risk of inflicting serious physical and emotional harm should they recidivate. In our Nation, a "trial is a public event," and "[w]hat transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). In this regard, even "the fact of [an] arrest is a permanent part of the public record." *Atwater v. City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting) (citing *Paul v. Davis*, 424 U.S. 693 (1976)); *accord Webster v. Redmond*, 599 F.2d 793, 798 n.6 (7th Cir. 1979) (stating that "publication of an official act such as an arrest does not itself give rise to a meritorious due process claim.") (citing *Paul*, 424 U.S. at 712-13).

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[8] (...continued)
and the fit between community notification and the goals of protecting the public and assisting law enforcement. *See generally id.* at 121.

If the logic of the lower courts' "implied stigma" analysis were correct, then a State would unfairly "stigmatize" some people who had been convicted of crimes simply by making available on the Internet an accessible database of all criminal conviction data. This would be true, notwithstanding that all of the "Criminal Convicts" data would be undeniably public information, and notwithstanding that presentation of such information through the internet simply facilitated access to already-public records.[9] Nothing in this Court's precedents supports such an illogical analysis.

Respondents may contend that the Connecticut SORS is somehow different than the "Criminal Convicts" database hypothesized above because the DPS website states that the information on it "'is made available for the purpose of protecting the public.'" *Doe*, 271 F.3d at 45 (quoting website). This statement, however, cannot be divorced from the specific statement on the website that the DPS "'has not considered or assessed the specific risk of reoffense with regard to any individual . . . and has made no determination that any individual included in the registry is currently dangerous.'" *Id.* at 44 (quoting website). The website's statement that the information was provided to help protect the public – a restatement of one of the purposes of making criminal conviction information publicly accessible in *any* situation – is of no constitutional moment, especially given the express disclaimer on the website that no individualized dangerousness analysis was attempted.[10]

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[9] Of course, the Connecticut SORS also contains information about the sex offenders' current addresses, which can be obtained through the registration regime. However, such registration requirements bear on whether there are "plus factors" at play, not whether there has been inaccurate "stigma" – particularly where, as here, there is no dispute about the accuracy of any information.

[10] CCI does not contend, of course, that States are precluded from adopting multi-tier sex offender notification regimes if they prefer to do so. (continued...)

C. The Lower Court Decisions Do Not Respect People's Ability to Make Sensible Decisions Based on Single-Tier Information Systems

At bottom, the decisions of the lower courts reflect a fundamental distrust in the ability of ordinary Americans to intelligently evaluate information about sex offenders and make rational decisions based on it.[11] Contrary to the tenor of the lower courts' opinions, ordinary Americans are able to sensibly digest the straightforward facts that: (1) a person who lives or works in their neighborhood has previously been convicted of a sex offense of some type; and (2) the State has not attempted to predict whether that person is particularly dangerous at the given time and under the particular circumstances that may confront the community member. The information available through the Connecticut SORS allows a community member to make his or her *own* decision about

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[10] (...continued)
CCI does believe, however, that evidence concerning the difficulty of assessing an individual sex offender's risk of recidivating, and the costs associated with the sorting process, can reasonably lead a State to conclude that a single-tier information access system for all convicted offenders is preferable. To the extent that this Court were to find any impliedly false message conveyed by the Connecticut SORS, CCI respectfully submits that this Court should make clear what sort of disclaimer would be sufficient to dispel such an implied allegation, so that legislatures are not forced to choose between the problems presented by multi-tier systems and the alternative of having no community sex offender notification regime at all.

[11] *See Doe*, 132 F. Supp. 2d at 63 ("Despite the accuracy of the registry data concerning the plaintiff and the statement on the web site that no determination of any individual's dangerousness has been made, the registry suggests that plaintiff is currently dangerous"); *Doe*, 271 F.3d at 42 (stating that the SORS leaves registrants "branded as likely to be currently dangerous offenders irrespective of whether they are"); *see also* Brief of Plaintiffs-Appellees Samuel Poe and John Doe, United States Court of Appeals for the Second Circuit, Docket Nos. 01-7561 (L), 01-7600 (XAP), at 49 (contending that the nature of the Connecticut information access mechanism "preclude[s] it from providing any meaningful information to members of the public about which offenders pose a threat to them").

what preventive steps, if any, are appropriate to protect that person, that person's spouse, or that person's children from the risk that the sex offender may present under a given set of circumstances at a given point in time. *See* 64 Fed. Reg. at 581 (stating that the regulations implementing the Wetterling Act are designed to ensure "that registration programs will include means for members of the public to obtain information concerning registered offenders that is necessary for the protection of themselves or their families").

Given the undisputable fact that "[s]ex offenses are almost always committed in private," *Verniero*, 119 F.3d at 1108, a person informed through the Connecticut SORS may conclude that no material risk is presented to them by a convicted sex offender who works pumping gas at the local filling station, or who is a clerk in the local hardware store. In contrast, a parent informed through the Connecticut SORS quite sensibly may conclude that an unacceptable risk is presented, for example, where the convicted sex offender wants to coach a youth swim team, or volunteer at a local day camp, or be a children's dance instructor.

The basic point is that the information access provisions in the Connecticut SORS give community members information to make these sorts of judgments *for themselves*. The genesis of the original Megan's Law, of course, was the idea that knowledge, rather than ignorance, was appropriate concerning the presence of sex offenders. This knowledge is essential, because sex offenders depend on anonymity and seclusion to commit many of their crimes. There is nothing in law or logic that justifies the conclusion that average Americans should not – indeed, constitutionally *may not* – be given information such as that available through the Connecticut SORS so that they can make reasonable, context-specific risk assessments to protect themselves and their families. That is particularly true where Connecticut has expressly informed citizens that no offender-specific risk assessment has been attempted.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

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No. 01-1231

In the

Supreme Court of the United States

Connecticut Dept. of Public Safety, et al.,
Petitioners,
v.
John Doe, et al.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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Motion for Leave to File *Amicus Curiae* Brief of The Reporters Committee for Freedom of the Press

Pursuant to Supreme Court Rule 37.2(b), The Reporters Committee for Freedom of the Press moves this Honorable Court for leave to file an *amicus curiae* brief in support of the Petitioners. The brief *amicus curiae* follows this motion.

The Reporters Committee has requested the consent of counsel to file a brief *amicus curiae*; however, it has not received any letters of consent from counsel. Shelley Sadin, Esq., counsel for one of the Respondents, gave consent by telephone, but *amicus* has not yet received a verification letter from her. Attorneys for the other Respondent and for Petitioners did not return telephone calls seeking consent.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Amicus is concerned with a subsidiary issue in this case: specifically, whether the dissemination of information can be restricted unless there is "proof" that the dissemination is necessary to protect public safety. The Second Circuit's ruling in this case is troubling because it implies that truthful information about convicted sex offenders should not be disseminated unless there is a showing that dissemination is necessary. *Amicus* is concerned that the Second Circuit's interpretation of the law could result in overbroad restrictions on the dissemination of truthful information.

Given the ramifications of a decision in this area for First Amendment and access interests, *amicus curiae* respectfully request that this Court grant it leave to file the attached brief.

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INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee has a strong interest in the First Amendment and access issues raised by this case. The Second U.S. Circuit Court of Appeals has ruled that a convicted felon is entitled to a hearing on his potential to commit future crimes before truthful information about the felon and his conviction can be disseminated. Placing restrictions on the dissemination of truthful information about those who have been convicted of crimes infringes on the First Amendment rights of the public and press, and limits the ability of the public to oversee the workings of its government. The appellate court's ruling is troublesome for an additional reason: it implies that there must be a showing of need before truthful information can be disseminated. The Reporters Committee strongly opposes any rule that requires evidence of necessity before truthful information may be disseminated. Finally, the Reporters Committee is troubled by any interpretation that would suggest that listing true information about criminal convictions could be defamatory.

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief. A motion for leave to file this brief was filed pursuant to Supreme Court Rule 37.2(b).

SUMMARY OF ARGUMENT

The Second Circuit erred in finding that due process protections must apply before the government may disseminate truthful information about a convicted criminal and his conviction. The dissemination of truthful information about a convicted criminal and his conviction should not be prohibited because it is "defamatory" or "derogatory." All of the information contained in the public registry is true. No allegations about character or behavior are implied merely by making a truthful statement about a past conviction.

The assertion that a person is "currently dangerous" cannot be proven true or false because such a determination would require knowledge of the person's future acts. It would be far more defamatory for the government to label persons as "future felons" than to merely list truthful information about past convictions. As a matter of policy, true information cannot be the basis of a defamation claim, regardless of whether the speaker is the government or a private entity.

ARGUMENT

I. The publication of truthful information about a conviction does not lead to a defamatory implication as a matter of law.

This case involves a constitutional challenge to a state's dissemination of true information about convicted sex offenders and the crimes for which they were convicted. The sex offenders have argued that their due process rights are violated because the government sex offender listings are a form of government defamation and the requirements of the registry law put their rights at risk. However, the sex

offender registries list only true information and no further allegations against the offenders are implied merely by disseminating this information.

In this case, the Second Circuit ruled that convicted sex offenders were entitled to a hearing to determine "whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry" of convicted sex offenders. *Doe v. Dept. of Public Safety*, 271 F.3d 38, 62 (2d Cir. 2001).

The court had considered the constitutionality of Connecticut's "Megan's Law," a law that requires certain convicted sex offenders to register with the state. The law also mandates that certain registry information, such as a convicted felon's name, address and conviction information, be disseminated by printed materials and an internet website. *Id.* at 41.

The court found that by including convicted sex offenders in a registry and disseminating the conviction information, the state "branded" such persons as "currently dangerous offenders." *Id.* at 41-42. The court made such a conclusion despite an explicit statement on the state website to the contrary. The website stated:

> The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.

Id. at 44.

The court reasoned that Due Process protections are required in cases of "governmental defamation" if (1) the government makes a statement that is sufficiently derogatory to injure a person's reputation, that is capable of being proved false, and that the person claims is false, and (2) there is some tangible and material burden or alteration of the person's status or right. *Id.* at 47 (*citing Paul v. Davis*, 424 U.S. 693 (1976)).

Amicus does not dispute that the *Paul* case sets forth the appropriate legal test. However, *amicus* disagrees with the Second Circuit's application of the test to the dissemination of information in sex offender registries.

The information contained in sex offender registries is not false information, nor does it consist of mere accusations. It was conceded at the appellate court that the information actually listed in the Connecticut registry was accurrate conviction information.

In numerous cases, convicted criminals have brought libel claims against those who have disseminated accurrate information about the conviction. Courts have consistently dismissed such claims, finding that the information disseminated is true and therefore may not be the basis for a defamation claim. *See, Schaefer v. Newton*, 57 F.3d 1073 (7th Cir. 1995) (convicted murderer could not sustain libel action against author for calling him a killer because statement is true, based on conviction); *Bukowski v. Hall*, 165 F. Supp. 2d 674 (N.D. Ohio 2001) (man convicted of sexual assault cannot maintain defamation suit against his victim because allegation was true, based on conviction: "The Court finds that without evidence of a reversal of the defendant's earlier conviction, no reasonable jury could conclude that the [woman's] statements were false");

Zandford v. Nat'l Assoc. of Securities Dealers, Inc., 19 F. Supp. 2d 1 (D. D.C. 1998) (person convicted of wire fraud cannot maintain libel action); *Jones v. Globe Int'l, Inc.*, 1995 WL 819177 (D. Conn. 1995) (person convicted of burglary cannot maintain libel action based on facts found true in criminal trial); *Velasquez-Campuzano v. Marfa Nat'l Bank*, 896 F. Supp. 1415 (W.D. Tex 1995) (true information reported about a crime cannot be basis for defamation claim).

In at least one case, a plaintiff who had been convicted of cheating by a university court argued that he was defamed by "the negative stigmatism associated with an honor conviction." *Cobb v. The Rector and Visitors of University of Virginia*, 69 F. Supp. 2d 815, 833 (W.D. Va. 1999). Such an argument is most closely analogous to the plaintiffs' claims in the present case that they are injured by the stigma resulting from their conviction, not that the information about the conviction is false. In the *Cobb* case, however, the court correctly noted that, although a person's reputation may be tarnished by a conviction, the fact of conviction is not false. The court also found that, as a matter of law, one cannot be defamed by the attitude others may take as a result of one's conviction. *Id.* The court stated:

> [T]he plaintiffs' . . . allegations — the Honor Committee's attitude that it is incapable of error and the negative stigmatism associated with an honor conviction — do not state a claim for defamation as a matter of law. . . . In addition, the plaintiffs' stigmatization theory fails as a defamation claim because it relies on their assertion that Cobb was wrongfully convicted of an honor violation. However, the conviction was based on a constitutional procedure and supported by adequate

> circumstantial evidence. . . . As such, the central element of a defamation claim, requiring a publication to be false, is not satisfied.

Id. at 833-34.

The plaintiff in this case makes an argument similar to the plaintiff's argument in *Cobb*. Plaintiff here contends that the "false" statement is the implication that he is presently dangerous. *Doe*, 271 F.3d at 48. However, the government has never made the assertion that Doe (or any other particular convicted sex offender) is presently dangerous. To the contrary, the government explicitly stated that it made no assessment as to whether any particular offender was dangerous.

The Second Circuit claimed that "the registry implies that each person listed is more likely than the average person to be currently dangerous" and that such an implication is stigmatizing. *Id.* at 49.

Amicus takes issue with such an interpretation. The registry lists the identities of persons who have been convicted of certain crimes. It is strictly a compilation of factual information for the purposes of public access to information. The registry, in itself, does not imply anything.

Our legal system specifically recognizes that the fact of a prior conviction cannot be used as evidence of a present or future crime. *See* Fed. Rules of Evidence 404 ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.") The rule of evidence was adopted because our government understood that the fact that a person has committed a crime in the past does not mean that they will commit another crime.

Such official recognition should be applied in the

present case. Although a citizen may use government records to research information about persons who have been convicted of sex offenses, the government does not thereby "stigmatize" the convicted criminal by suggesting that he is "currently dangerous." Providing access to conviction information does not imply that the person is "currently dangerous," because our legal system recognizes that there is no necessary connection between past and present conduct. Such a common sense rule should not be circumvented in this case, and a plaintiff should not be permitted to create "stigma" merely because he subjectively feels stigmatized.

In a recent Second Circuit case, the court recognized that the government publication of truthful information about a criminal conviction is <u>not</u> defamatory and does not affect any interest raising due process rights. *Wells v. Goord*, 29 Fed. Appx. 693, 2002 WL 24314 (2d Cir. 2002) (*unpublished opinion*). In *Wells*, a prison inmate convicted of robbery brought a Section 1983 claim against the Commissioner of Corrections, alleging that he was defamed by the government and his due process rights were violated because the Department of Corrections website listed information about his conviction. The Second Circuit found that the inmate was not entitled to notice and an opportunity to be heard before the government labeled him a "convicted robber" because he had, in fact, been convicted of robbery, thereby making the website's statement true. *Id.*

The Second Circuit should have applied the same reasoning in this case. The only statement made by the government is the factual listing of information about Plaintiff and his conviction. The information listed is true and therefore should not invoke any due process rights before the information may be disseminated.

II. The alleged assertion that a person is "currently dangerous" is not capable of being proven true or false.

The Second Circuit asserted that a registry implies that a convicted felon is "currently dangerous" and found that such an implication was defamatory. Part of the *Paul* test requires that an alleged defamatory statement be capable of being proved true or false. The most puzzling part of the Second Circuit's decision in this case is the court's determination that it is possible to prove true or false the issue of whether a particular person is "currently dangerous."

Amicus disputes that the sex offender registry implies that a person is "currently dangerous." But even assuming, *arguendo*, that such an implication was made, it cannot be proven true or false at any given time.

Presumably, by the term "currently dangerous," the court is referring to whether the felon is likely to commit a crime in the reasonably forseeable future, as opposed to the past or immediate present. However, it is not possible to determine whether such a statement is true or false until the person commits or does not commit a crime. But since there is always the possibility that he may commit a crime in the future (which is unknowable), such a statement is incapable of being proved true or false.

The Second Circuit's proposal is far more damaging to the plaintiff than the state's registry is. The state merely wishes to list truthful information about past convictions. The Second Circuit proposes to have the government explicitly label people as "currently dangerous," which may turn out to be false. It would raise far more of a stigma for a court or court-appointed "expert" to hold a hearing, make a determination and label a person as "currently dangerous."

With such a determination, the person becomes clearly stigmatized with a government-stamped warning. And, if the person does not commit any additional crimes, would he (or his estate) have a civil rights suit against the person who falsely labeled him "currently dangerous?"

Notably, the Second Circuit stated that it took no position on the form of the required hearing. It is difficult to imagine how any judge or other "expert" could determine whether a person will commit a crime in the future.

In essence, the Second Circuit is asking judges to label people as "future felons." Such a stigma would be far more problematic than listing truthful information about past convictions.

III. If due process protections apply, they should apply prior to registration.

The Second Circuit ruled that sex offenders were entitled to due process hearings before information about their convictions was disseminated to the public. However, if this Court finds that convicted sex offenders are entitled to notice and an opportunity to be heard, then such protections should apply before they are required to register with the state. It makes little sense to rule that sex offenders must register but that the information can't be released without a hearing.

For example, in *Doe v. Pryor*, 61 F. Supp. 2d 1224 (M.D. Ala. 1999), the court found that a man convicted of a federal sex offense was entitled to a hearing prior to registration under Alabama sex offender registry law to determine whether his federal conviction was equivalent to a sex offense in Alabama. In essence, the court found that due process protections applied to determine whether he

had to comply with the law at all, but if the law applied to him, then the information could be included in the registry.

Amicus opposes a rule that requires offenders to register, but requires proof of necessity (i.e. proof of "dangerousness") before the information about the offender may be released. Such a rule would interfere with the public's ability to examine how the government is administering its laws. Furthermore, it would render the registry ineffective and pointless.

CONCLUSION

Amicus respectfully requests that this Court find that due process protections are not required before the government may disseminate truthful information about a convicted criminal and his conviction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, et al.,
Petitioners,

vs.

JOHN DOE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prevents a State from listing convicted sex offenders in a publicly disseminated registry without first affording such offenders individualized hearings on their current dangerousness.

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IN THE

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CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, et al.,
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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attack on the constitutionality of a state-created Web site that lists convicted sex offenders solely by virtue of their conviction. The Internet registry was created for the purpose of protecting the public and for facilitating

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

access to publicly available information. The Second Circuit's decision makes it far more difficult for the public to access this information, effectively denying parents the ability to warn children of convicted sex offenders living in their neighborhoods. This result is contrary to the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The present case arises from an objection to Connecticut's "Sex Offender Registry" Internet database, which was part of the state's version of "Megan's Law." *Doe* v. *Dep't of Public Safety*, 271 F. 3d 38, 42 (CA2 2001). Before the District Court issued an injunction, anyone with access to the Internet was able to search the database by zip code, town name, or by last name. *Id.*, at 44. The search results yielded a direct link to another page entitled "Registered Sex Offender," containing the registrant's name, address, photograph, and physical description. The first page of the Web site contained a statement that read in part:

> "The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous . . . . The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual." *Ibid.*

The persons listed in the database were individuals convicted of one of four statutorily defined categories: criminal offenses against a victim who is a minor, nonviolent sexual offenses, sexually violent offenses, and felonies committed for a sexual purpose. See Conn. Gen. Stat. §§ 54-250(2), (5), (11), (12), 54-251(a), 54-252(a), 54-254(a).

John Doe, the plaintiff in this case, alleged that he was convicted of one of the offenses designated in the statute, but has not specified the offense. See App. to Brief in Opposition 3. Doe filed suit under 42 U. S. C § 1983, alleging that Connecticut's sex offender law violated the *Ex Post Facto* Clause and his Fourteenth Amendment right to procedural due process. Doe claimed that the procedural due process violation occurred because he was not given an opportunity to avoid being listed on the Internet database. The District Court granted summary judgment to Doe on the due process claim and dismissed the *Ex Post Facto* claim. *Doe* v. *Lee*, 132 F. Supp. 2d 57, 59 (D. Conn. 2001). John Doe filed a motion for class certification of all persons who were subject to the registration and public disclosure requirements of Connecticut's sex offender act. The District Court granted the motion, as well as Doe's motion for a permanent injunction. *Doe* v. *Dep't of Public Safety*, 271 F. 3d, at 46-47.

When Connecticut appealed, Doe argued, and the Court of Appeals agreed, that his reputation, combined with the alteration of his status under state law, constituted a protected liberty interest deserving of procedural due process protection. 271 F. 3d, at 46. The Court of Appeals stated that the registry and the disclaimer imply that each person listed is more likely than the average person to be currently dangerous. "That implication seems to us necessarily to flow from the State's choice of these particular individuals about whom to disseminate information, a record as to their sex offenses, and information as to their current whereabouts. This implication stigmatizes every person listed on the registry." *Id.*, at 49. In affirming the judgment of the District Court, the Court of Appeals stated that it was prohibiting the state from disseminating registry information without giving individuals an opportunity to prove that they are not currently dangerous. *Id.*, at 62. This Court granted certiorari.

SUMMARY OF ARGUMENT

Plaintiff's challenge to the Connecticut statute is really a substantive challenge "recast in 'procedural due process' terms." The statute provides that all persons convicted of certain offenses will be listed in a publicly available registry without any determination of present dangerousness. As a matter of substantive law, then, the statute renders present dangerousness legally irrelevant. As in *Reno* v. *Flores*, *Michael H.* v. *Gerald D.*, and *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, if the statute is substantively valid, there is no procedural due process issue.

To be substantively valid, the statute needs only a rational relation to a legitimate government interest. The difficulties in predicting the dangerousness of sex offenders are well known. The consequences of an erroneous prediction of nondangerousness are horrific. Given those realities, the Connecticut Legislature is well within its broad range of discretion to forego individualized predictions and base its registry on the simple fact of conviction.

ARGUMENT

I. If the statute is substantively valid, there is no procedural due process question.

Once again, a substantive challenge to a statute comes to the Court "recast in 'procedural due process' terms." *Reno* v. *Flores*, 507 U. S. 292, 308 (1993); see also *Michael H.* v. *Gerald D.*, 491 U. S. 110, 121 (1989) (plurality opinion); *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 105 (1978) (statute, not board action, caused franchise delay). The principle by now should be clear. If a *valid* statute provides that undisputed fact X leads to legal consequence Y regardless of disputed fact Z, there *cannot* be a procedural due process right to a hearing on Z. A successful substantive attack

on the statute is a prerequisite to any claim of right to a hearing on a fact which the statute makes irrelevant.

Professors Rotunda and Nowak describe the distinction between procedural and substantive due process:

> "It is important to realize that procedural review is limited in scope. Procedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person's life, liberty or property. This aspect of the due process clauses does not protect against the use of arbitrary rules of law which are the basis of those proceedings. It is only necessary that a fair decision-making process be used; the ultimate rule to be enforced need not be a fair or just one.
>
> "For example, if a state legislature enacted a law which imposed the death penalty upon any person who had been found guilty of double parking an automobile after a determination of guilt through trial by jury and appellate review, the law would clearly comport with the *procedural* restrictions of the due process clauses. The law might violate the Eighth Amendment, as applied to the states by the Fourteenth Amendment, in that it constituted cruel and unusual punishment. Indeed the law might also violate the substantive guarantee of the due process clause of the Fourteenth Amendment insofar as it was an irrational and arbitrary abuse of the government's power to protect against traffic hazards. However, so long as the decision-making process by which the burden of the death penalty was handed out was a fair one, the law could not be stricken on the basis of 'procedural' due process." 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 14.6, p. 530 (3d ed. 1999) (emphasis in original).

More realistic, if less dramatic, examples can be found in the cases cited above. In *Reno* v. *Flores*, the INS had adopted a policy of keeping alien juveniles in custody pending deportation hearings when there was no parent or guardian available to

take custody. See 507 U. S., at 296. The Court analyzed the substantive validity of the policy first, rejecting the claim that a "best interests of the child" standard for custody was constitutionally required. *Id.*, at 304. From this substantive premise, the conclusion easily follows that there is no procedural due process right to a "best interests" hearing.

> "Respondents contend that this procedural system is unconstitutional because it does not require the Service to determine in the case of each individual alien juvenile that detention in INS custody would better serve his interests than release to some other 'responsible adult.' This is the 'substantive due process' argument recast in 'procedural due process' terms, and we reject it for the same reasons." *Id.*, at 308.

Michael H. v. *Gerald D.*, involved a conclusive presumption that a child born to a married woman was the child of her husband, with no exceptions applicable to the case. See 491 U. S., at 113, 117-118. The plurality rejected Michael's claim of a procedural due process right to a hearing on biological paternity, because the statute was a rule of substantive law that rendered that fact irrelevant. See *id.*, at 119-120. The remainder of the opinion addresses the validity of the statute under substantive due process. See *id.*, at 121-132.

New Motor Vehicle Bd. involved a law that maintained the status quo of car dealer franchises, preventing the opening of a new franchise, pending an administrative hearing. See 439 U. S., at 103. "[T]he issue is whether . . . the right to franchise without delay is the sort of interest that may be suspended only on a case-by-case basis through prior individualized trial-type hearings." *Id.*, at 106. The Court rejected the claim, noting that it was the statute, not any action by the Board, "that curtailed General Motors' right to franchise at will." *Id.*, at 105. If the law requiring the delay regardless of individual circumstances was substantively valid, there could be no procedural due process right to a hearing on those circumstances. See *id.*, at

114 (Blackmun, J., concurring in the result); 2 Rotunda & Nowak, *supra*, at 533-534.

In the present case, the substantive law enacted by the Connecticut Legislature is that the persons convicted of the listed offenses will be listed in the registry. There is no provision for a hearing on present dangerousness, because the legislative policy choice was that case-by-case determinations would not be made, just as in *Flores*, *Michael H.*, and *New Motor Vehicle Bd.* In all four cases, the legislature or agency decided that the disadvantages of case-by-case determination of the fact claimed by the challenging party outweighed the advantages, and it decided to let the legal consequences be determined by a different fact. In *Flores* it was relationship versus "best interests." In *Michael H.* it was marriage versus biology. In *New Motor Vehicle Bd.* it was the existing dealer's protest rather than actual market conditions. In the present case, it is the prior conviction of a crime rather than a psychiatrist's opinion or other showing of present dangerousness.

In all four cases, the threshold question is the substantive validity of the legislature's or agency's decision to let consequence Y be determined by fact X rather than fact Z. If that decision is valid, there can be no right to a hearing on Z.

II. The statute is substantively valid.

The key question in this case is whether the Connecticut Legislature's decision to include all qualifying sex offenders in the registry without a case-by-case determination of present dangerousness constitutes "the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . . ." *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846 (1998). The answer is no.

A. The Rationality Standard.

The "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Id.*, at 846.[2] Substantive due process review of statutes is a treacherous field. See *Albright* v. *Oliver*, 510 U. S. 266, 281 (1994) (Ginsburg, J., concurring). The most egregious violations of the people's right of democratic self-government have occurred here. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *County of Sacramento* v. *Lewis*, No. 96-1337, pp. 5-7 (available from http://www.cjlf.org/pdf/LewisT.pdf). As the Court explained in *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997),

> "But we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' *Collins* [v. *Harker Heights*], 503 U. S. [115], 125 [1992]. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' *ibid.*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, [citation]."

For this reason, exacting scrutiny is reserved for statutes impairing "fundamental rights found to be deeply rooted in our legal tradition." *Glucksberg*, 521 U. S., at 722. All other statutes need only "be rationally related to legitimate government interests." *Id.*, at 728. In reviewing a statute for rationality, the judicial branch need not and should not weigh the

2. This is another reason, in addition to the procedural/substantive distinction discussed in part I, *supra*, why the *Paul* v. *Davis*, 424 U. S. 693 (1976) line of cases is only tangentially related to this case.

relative strengths of the competing interests. See *id.*, at 735. That is the function of the legislative branch.

B. Identifying the Purported Right.

"As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated." *Lewis*, 523 U. S., at 841, n. 5. Plaintiff essentially claims a right to be excluded from the state's sex offender registry if he can establish on an individual basis that he is not presently dangerous. See Brief in Opposition 1. Given that the registry expressly disclaims any statement about present dangerousness and only claims to be a statement of the undisputed fact of the prior conviction, this is a most remarkable assertion. "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it . . . ." *Reno* v. *Flores*, 507 U. S. 292, 303 (1993). Any claim that this purported right rises to the level of "fundamental," so as to require more than a rational basis, see *Glucksberg*, 521 U. S., at 722, would be frivolous.

At this point, we should note a possible objection to the Connecticut statute that is not at issue in the present case.

> "The statute does not itself give a name to the registry. The State refers to it, and referred to it on the Internet site, as the 'Sex Offender Registry,' although it includes persons convicted of several crimes 'against a victim who is a minor' that are not necessarily sexual in nature." *Doe*, 271 F. 3d, at 44, n. 13.

An action brought by persons convicted of nonsexual offenses who objected to the title of the registry would present different issues. They could claim a false representation and executive action beyond the mandate of the statute. Plaintiff John Doe does not allege that his offense was not a sex offense, or even tell us what it was. See App. to Brief in Opposition 3. The plaintiff class is all persons subject to the law, *id.*, at 5, and the District Court's injunction applies to the entire class. See *Doe*,

271 F. 3d, at 46. The present case thus deals with the statute in its principal application, to persons convicted of sex offenses, and not whether a limited subset of the class might be entitled to a more carefully tailored injunction, such as changing the name of the registry or separating the nonsexual offenders into a different registry. That is a case for another day, and apparently another representative plaintiff.

C. Application of the Standard.

There can be no doubt that protecting the public from sex offenders is a legitimate state interest. Indeed, it would easily qualify as a compelling interest, if that were required. See *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). The horrifying murder of Megan Kanka, see *State* v. *Timmendequas*, 161 N. J. 515, 537-544, 737 A. 2d 55, 66-70 (1999), by a twice-convicted sex offender, see *id.*, at 535, 737 A. 2d, at 65, galvanized the nation, and led to the enactment of the present statute, parallel statutes in all the other states, and an Act of Congress. See *State* v. *Timmendequas*, 168 N. J. 20, 28, 773 A. 2d 18, 22 (2001) (*Timmendequas II*); *Doe*, 271 F.3d, at 42.

The question of whether the means chosen is rationally related to this eminently legitimate interest nearly answers itself. Recidivism is a particular problem with sex offenders. Over 40% of prisoners convicted of rape or other sexual assaults are arrested for a new offense within three years of their release from prison. Bureau of Justice Statistics, Recidivism of Prisoners Released in 1994, p. 8 (2002) (table 9). The nature of sexual offenses and sexual offenders makes reality even worse than this figure suggests. Sexual offenders are more likely to be rearrested for a similar charge than other types of offenders. See *id.*, at 10 (table 11). This danger is compounded by the fact that sex crimes are notoriously underreported. Although estimates of the fraction of sex crimes actually reported vary, all of them are low. See R. Holmes, Sex Crimes 75 (1991) (10% of rapes); Center for Sex Offender Management, Recidivism of Sex Offenders 3 (May 2001)

(available from http://www.csom.org/pubs/recidsexof.pdf) ("vastly underreported"; less than one in three sexual assaults on victims over 12 reported). Since the record on treatment is mixed at best, see, *e.g.*, Quinsey, Harris, Rice, & Lalumière, Assessing Treatment Efficacy in Outcome Studies of Sex Offenders, 8 J. Interpersonal Violence 512, 512-513 (1993); Recidivism of Sex Offenders, *supra*, at 13, safety is paramount.

Predictions of future dangerousness, particularly by mental health professionals, have long been controversial. *Barefoot* v. *Estelle*, 463 U. S. 880 (1983) addressed the constitutionality of the prosecution's use of psychiatric testimony to establish a capital defendant's future dangerousness. See *id.*, at 896. One contention was that psychiatrists were generally incompetent to make such predictions. See *ibid.* As the dissent noted, the American Psychiatric Association and numerous studies concluded that psychiatrists could not accurately predict future violent behavior. See *id.*, at 920-921 (Blackmun, J., dissenting). In spite of this, states could choose to allow this type of testimony to be admitted. Any doubts about the credibility of such predictions could be assessed by the jury. See *id.*, at 898-899 (majority). The general reliability of such assessments was similarly contested in *Kansas* v. *Hendricks*, 521 U. S. 346 (1997), which addressed the constitutionality of the civil commitment of violent sexual predators who have a "mental abnormality" that makes them likely to commit future violent sexual offenses. See *id.*, at 350. The ability of mental health professionals to diagnose the future dangerousness of sex offenders was again contested by the defense. See *id.*, at 355, n. 2. As in *Barefoot*, the state could make this finding a part of its procedure. See *id.*, at 357-358. The Court found that there was " 'nothing inherently unattainable about a prediction of future criminal conduct.' " *Id.*, at 358 (quoting *Schall* v. *Martin*, 467 U. S. 253, 278 (1984)). When combined with a finding of mental abnormality, the future dangerousness requirement appropriately narrowed the class of offenders eligible for civil commitment. See *ibid.*

The fact that such predictions have been deemed constitutionally *permissible* in conjunction with other factors in other contexts does not mean that Connecticut is constitutionally *mandated* to accept them as controlling in the present context. There is, or should be, a broad range of policy choices between what the Constitution forbids and what it requires. The question is only whether Connecticut's decision on the question is rational.

Notwithstanding *Barefoot* and *Hendricks*, there remains considerable basis for doubt about the reliability of predictions of dangerousness. "There is clear evidence in the sex offender treatment field that there is no specific profile of a sexual offender." Becker & Murphy, What We Know and Do Not Know About Assessing and Treating Sex Offenders, 4 Psychology, Pub. Pol. & L. 116, 123 (1998). Psychologists do not agree as to which method should be used in individual risk assessment. See Litwack, Actuarial Versus Clinical Assessments of Dangerousness, 7 Psychology, Pub. Pol & L. 409, 409 (2001). Some psychologists and researchers assert that actuarial (statistical) methods are better at predicting the future behavior of an individual, while other experts in the field argue for clinical evaluations. See *id.*, at 409-410.

Predicting the future behavior of a sex offender presents unique difficulties for psychologists because sex offenders are known to deny or minimize their past criminal history. Marshall, Current Status of North American Assessment and Treatment Programs for Sexual Offenders, 14 J. Interpersonal Violence 221, 222-223 (1999). Marshall states that offenders typically represent themselves in an exculpatory manner and that many outright deny they ever committed an offense. *Ibid.* Without accurate external information (police reports, victim statements, and possibly court records), mental health professionals easily reach inaccurate results. McGrath, Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings, 35 Int'l J. of Offender Therapy & Comp. Criminology 328, 331 (1991). Even with those

records, given the facts that only a small percentage of sexual offenses are reported and that offenders routinely lie, see *ibid.*, it seems evident that mental health professionals do not even have the necessary information to make predictions.

Becker and Murphy address the increasingly difficult questions that the legal system is asking mental health care professionals. See 4 Psychology, Pub. Pol. & L., at 116. They admit that the ability of mental health care professionals to answer these questions varies considerably. *Id.*, at 121. Psychological test data has not been highly predictive of recidivism of sex offenders. *Id.*, at 125. Some of the difficulty in this field is due to the problem of sex offender denial. *Id.*, at 123. Because sex offenders generally deny their past criminal activity, some clinicians are experimenting with the use of polygraph tests to evaluate dangerousness. *Ibid.* One such study "on a sample of imprisoned sex offenders with fewer than two known victims (on average), found that these offenders actually had an average of 110 victims . . . ." Recidivism of Sex Offenders, *supra*, at 3.

The most successful studies at predicting recidivism in individuals have only yielded accuracy results in the 40-45% range over random predictions. 4 Psychology, Pub. Pol. & L.,at 126. Prentky, Knight, and Lee, Risk Factors Associated with Recidivism Among Extrafamilial Child Molesters, 65 J. Consulting & Clinical Psych. 141 (1997), studied recidivism of convicted child molesters. The method used in this study correctly identified 25 sex offenders who re-offended, and 58 who did not. *Id.*, at 146 (table 4). But the study misidentified 15 whom they predicted to re-offend, but who did not, and, most importantly for the present case, 15 whom they predicted not to re-offend, but who did. *Ibid.* And those are only the ones who were caught. See *id.*, at 144.

Center for Sex Offender Management, Recidivism of Sex Offenders, *supra*, provides a useful summary of the state of

research to date.[3] The article acknowledges that there are no absolutes or "magic bullets" in identifying factors that indicate an offender's risk to society. *Id.*, at 4. Rather, risk assessment

> "is an exercise in isolating factors that *tend* to be associated with specific behaviors. While this association reflects a likelihood, it does not indicate that all individuals who possess certain characteristics will behave in a certain manner. Some sex offenders will inevitably commit subsequent sex offenses, in spite our best efforts to identify risk factors and institute management and treatment processes aimed at minimizing these conditions." *Ibid.* (emphasis in original).

The area of sex offender risk assessment is a relatively new field in psychology that has yet to create an airtight method of determining which offenders will repeat their crimes. Psychology is a science with few absolutes. When a legislature " 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.' " *Jones* v. *United States*, 463 U. S. 354, 370 (1983) (quoting *Marshall* v. *United States*, 414 U. S. 417, 427 (1974)). In applying this proposition to the state's action in *Kansas* v. *Hendricks*, the Court stated that the fact that psychiatric professionals were not in complete harmony regarding the classification of pedophilia as a mental illness afforded the Kansas legislature the widest latitude in drafting the civil commitment statute. 521 U. S., at 360, n. 3. In applying this principle to the present case, Connecticut should be afforded the widest latitude in its choice *not* to undertake individual dangerousness assessments.

While it is true that there are no guarantees with any type of psychological assessment, the big difference with assessing sex offenders is that the price of failure is the victimization of

3. CSOM is a "collaborative effort of the Office of Justice Programs, the National Institute of Corrections, and the State Justice Institute . . . ." *Id.*, at 1.

an innocent person. Furthermore, convicted sex offenders subject to registration already possess the one factor universally associated with future sex offending—their prior sex offense conviction. See McGrath, Sex-Offender Risk Assessment, *supra*, 35 Int'l J. Offender Therapy & Comp. Criminology, at 336. It is beyond dispute that sex offenders in general "are much more likely to commit subsequent sexual offenses than the general criminal population," Recidivism of Sex Offenders, *supra*, at 15-16, not to mention the general law-abiding population. Connecticut's decision to warn the public of *all* convicted sex offenders *might* be considered irrational if an individual offender could show to a certainty that he is no more dangerous than the average person. However, given the current state of knowledge, the state is entitled to conclude that no such showing can be made.

The outrage that prompted Megan's Law was that a twice-convicted sex offender was living in the community, and that the fact of his convictions was not known to the public. *Timmendequas II*, 168 N. J., at 28, 773 A. 2d, at 22. If Megan's parents had known, they could have warned her to stay away from Timmendequas. If convicted sex offenders can be dropped from the registry upon a "showing" they are no longer dangerous, the Megan Kanka story will be repeated in those cases where the "showing" turns out to be wrong.

The Connecticut Legislature has decided that the risk of error in a prediction of nondangerousness exceeds the benefit of allowing exclusion on that basis. It is not the place of the Second Circuit, this Court, or any court to reweigh that risk-benefit assessment. See *Glucksberg*, 521 U. S., at 735. The choice is well within the bounds of rational relation to the undisputably legitimate goal, and that is sufficient to make the choice a legislative one, not a judicial one.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed.

July, 2002

Respectfully submitted,

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(13)

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IN THE

Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, *et al.*,
Petitioners,

v.

JOHN DOE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause prevents a State from making accessible information about sex offenders in a publicly disseminated registry without first affording such offenders individualized hearings on whether they are currently dangerous.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

The incidence of sex crimes is a matter of great public concern. Sex crimes frequently impose both physical injury and emotional trauma on their victims. While the States have greatly increased their prosecution efforts, most sex offenders are released eventually to the community. Studies have found that a substantial number of sex offenders will reoffend following their release and that reoffending can occur more than twenty years later. As one report concludes, "[m]any sex offenders commit a wide range and large number of sexually deviant acts during their lives and show a continued propensity to reoffend." Kim English, *et al.*, U.S. Dep't of Justice, *Managing Adult Sex Offenders in the Community – A Containment Approach* 2 (1997).

"Sex crimes flourish in secrecy [and] [s]ex offenders have secretive and manipulative lifestyles." *Id.* Every State has therefore enacted a statute requiring sex offenders to register and authorizing public disclosure of relevant information. Connecticut, like many other States, makes sex offender registration information available through the Internet without conducting an individualized assessment of each registrant's reoffense risk.

The court of appeals held that the Due Process Clause requires Connecticut to provide each sex offender with a hearing to determine whether "they are particularly likely to

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

be currently dangerous before being labeled as such in a publicly disseminated registry." Pet. App. 39a. Affirmance of this holding would undermine the ability of the States to protect their citizens from recidivist sex offenders because the prediction of a sex-offender's recidivism risk cannot be made without substantial error rates.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. Sex offenses impose an extraordinary toll on society. In addition to the costs of medical and mental health care, these crimes impose on their victims both physical injury and great emotional trauma. State and local governments have a compelling interest in reducing the high incidence of sex crimes and in protecting their citizens from becoming victims of these crimes.

Numerous studies have found that a substantial portion of convicted sex offenders commit new sex offenses following their release to the community. For example, a study of released child molesters found a 52 percent failure rate for committing a new sex offense over a twenty-five year period. *See* Robert A. Prentky, *et al.*, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635, 643 (1997). Moreover, in several studies which interviewed sex offenders, the offenders admitted to committing vastly more sex offenses than those for which they were arrested. Research has also shown that some sex offenders reoffend as late as twenty years following their release.

Predicting whether a particular sex offender is likely to reoffend is a matter of great complexity as there are numerous factors of both a static and dynamic nature that may be relevant to the prediction. Moreover, under the current state

of sex offender recidivism research, the available methods of conducting individualized risk assessments have low predictive accuracy. Furthermore, "[t]he prediction of future behavior can never be done with certainty since people and circumstances can and do change." R. Karl Hanson, *The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism* 2 (1997).

Because the prediction of recidivism by individual offenders is fraught with uncertainty, a State can reasonably choose to protect it citizens by making relevant sex offender information accessible to the public without conducting individualized risk assessments. Indeed, this is precisely the type of area where "'legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (citation omitted).

2. Connecticut's disclosure of sex offender registration information by making it publicly accessible through the Internet does not implicate a liberty interest protected under the Due Process Clause. Neither statutory nor constitutional law creates any right or legitimate expectation on the part of a sex offender in preventing public disclosure of registration information. Making sex offender information publicly accessible does not involve a governmental restraint on a sex offender's freedom of action or result in the "denial of any right vouchsafed to him by the State." *Paul v. Davis*, 424 U.S. 693, 712 (1976). The Due Process Clause thus does not require that Connecticut provide sex offenders with a hearing to assess whether they are "particularly likely to be currently dangerous" before disclosing their registration information. Pet. App. 39a.

Before the Connecticut program was enjoined, the State's registry made available "the registrant's name, offense, current residence address, physical description and photograph." Pet. App. 47a. A registrant's conviction for a sex offense is

a public record. Moreover, addresses are found in numerous other public records. While a State can choose to protect address information from public disclosure, there is no constitutional requirement that it do so. Finally, publication of an offender's photograph does not implicate constitutionally protected liberty. *See Paul*, 424 U.S. at 695, 712.

While the court of appeals acknowledged that under *Paul* a claim of stigmatic injury does not state a violation of the Due Process Clause, the court further reasoned that the State's registration requirement raises the sex offenders' injury to the level of a Due Process violation. This reasoning ignores that the obligation to register is imposed only after each registrant has been provided full pre-deprivation process in the form of a criminal trial. Because the State has already provided sex offenders with an adequate remedy to protect against unjustified impositions of the registration obligation, the Connecticut scheme does not violate due process. *Cf. Dixon v. Love*, 431 U.S. 105, 113-14 (1977).

3. The court of appeals' hearing requirement would also undermine public safety. While the court's requirement contemplates some probability assessment of an offender's risk of reoffense, such predictions are highly problematic because the actual base rates of sex offender recidivism are unknown and reported rates are believed to widely underestimate the actual level of reoffending. Moreover, the available methods of predicting whether a sex offender will engage in recidivism have only moderate predictive accuracy and thus have substantial error rates. Finally, the court's "currently dangerous" standard ignores research showing that "most reoffenses [did] not occur within the first several years" following release and that some sex offenders committed a new sex offense more than twenty years later. Prentky, *Recidivism Rates*, 21 Law & Hum. Behav. at 652. Furthermore, even those offenders classified as low risk may

reoffend because of future changes in their post-hearing environment and circumstances. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT REQUIRE A STATE TO PROVIDE A HEARING TO ASSESS A CONVICTED SEX OFFENDER'S RISK OF REOFFENSE BEFORE MAKING THE OFFENDER'S REGISTRATION INFORMATION ACCESSIBLE TO THE PUBLIC

I. SEX CRIME IS A SOCIAL PROBLEM OF EXTRAORDINARY MAGNITUDE [2]

The incidence of sex crimes is a matter of great public concern. State and local governments have a compelling interest in reducing the disturbingly high number of these crimes, which impose enormous harm on their victims.

It is widely acknowledged that government statistics underreport the level of sex crimes. *See* Robert A. Prentky, *et al.*, U.S. Department of Justice, *Child Sexual Molestation: Research Issues* 1 (1997) (noting that "[t]he assumption that sexual crimes against children and teenagers are underreported is now commonly accepted"). Various studies have concluded, however, that the number of such offenses is enormous. *See, e.g.*, Ted R. Miller *et al.*, U.S. Department of Justice, *Victim Costs and Consequences: A New Look* 2-3 (1996). For example, the Miller study (which reviewed other studies) estimated that from 1987 through 1990, children were the victims of an annual average of 71,000 rapes and 114,000 acts of other forms of sexual abuse. *See Victim Costs and Consequences*, at 3. Adults were the victims of

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[2] This section is substantially similar to the discussion of sex offender recidivism contained in *amici*'s brief filed in *Godfrey v. Doe*, No. 01-729, *cert. granted*, Feb. 19, 2002.

1,133,000 rapes and sexual assaults. *See id.*; *see also id.* at 5 (noting study that surveyed adult women finding that in 1990, 683,000 women were raped, but which did not include rapes of persons under the age 18 or males).

Sex offenses impose on their victims substantial costs of both a tangible and intangible nature. *See id.* at 9, 14-15. Beyond the costs of medical and mental health care, such crimes can cause both physical injury and great emotional trauma. As another report explains, "the trauma associated with sexual assault include shame, self-blame, fear, developmental crises, post-traumatic stress disorder, and the threat or actuality of physical violence, terror, and injury." Kim English *et al.*, U.S. Department of Justice, *Managing Adult Sex Offenders in the Community-A Containment Approach* 1 (1997). Moreover, "what might be regarded by some as a relatively minor type of sexual assault (e.g., 'just fondling') can be extremely traumatic to a victim who trusted the perpetrator."[3] *Id.*

Most troubling, in several studies sex offenders have admitted to "vastly more" criminal paraphilic acts "than those for which they were convicted." Prentky, *Child Sexual Molestation*, at 1. In one study, which conducted confidential interviews with 561 non-incarcerated paraphiliacs, 224 of the subjects reported committing 5,197 acts of non-incestuous child molestation against 4,435 female victims and 153 of the subjects reported committing 43,100 acts against 22,981 male

[3] According to a recent Justice Department report, 34.2% of child sexual assaults were committed by a family member of the victim; another 58.7% were committed by acquaintances of the victim. *See* U.S. Department of Justice, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 10 (2000) (Table 6). With respect to children under the age of 12, the rate of sexual assault by family members is even more pronounced: 48.6% of sexual assaults on children under age 6 were committed by a family member and 42.4% of sexual assaults on children ages 6 to 11 were committed by a family member. *Id.*

victims. *See* Gene G. Abel *et al.*, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. Interpersonal Violence 3, 19 (1987). With respect to incestuous acts, 159 of the study's subjects reported committing 12,927 acts of incest against 286 female victims and 44 subjects reported committing 2,741 acts of incest against 75 male victims. Finally, 126 of the subjects reported committing 907 acts of rape against 882 victims. *See id.*[4]

Another study of 23 rapists and 30 child molesters participating in a treatment program also indicates that sex offenders commit far more sex offenses than they are arrested for. While "the rapists had an average of less than two arrests each, they collectively admitted to more than 5,000 offenses including 319 child molestations and 178 rapes." Virginia Criminal Sentencing Commission, *Assessing Risk Among Sex Offenders in Virginia* 43 (2001) (discussing Robert E. Freeman-Longo & Geral T. Blanchard, *Sexual Abuse in America: Epidemic of the 21st Century* (1998)). Moreover, while the 30 child molesters had "an average of only 1.5 arrests each," they "admitted to over 20,000 acts, including nearly 6,000 child molestation offenses and 213 rapes of adult women." *Id.* Finally, using polygraphy as part of its treatment program, the Colorado Department of Corrections found that "while official records indicated an average of only two victims per offender," the offenders admitted to an "average 184 victims per inmate." *Id.* As one report concludes, "[m]any sex offenders commit a wide range and large number of sexually deviant acts during their lives and show a continued propensity to reoffend." English, *Managing Adult Sex Offenders in the Community*, at 2.

In response to the problem of sex crimes, the States have substantially increased their prosecution efforts. Since 1980,

[4] One hundred forty two of the study's subjects admitted to 71,696 acts of exhibitionism. *See* Abel, *Self-Reported Sex Crimes*, 2 J. Interpersonal Violence, at 19.

the States have "more than doubled" the annual rate of conviction for rape, child molestation, and sexual assault and are now incarcerating more than four times as many sex offenders as they did in 1980.[5] *See Managing Adult Sex Offenders*, at 1; U.S. Department of Justice, *Correctional Populations in the United States, 1997* 6 (2000) (table 1.13). Nonetheless, "[t]he vast majority of sex offenders are released eventually" to the community. Prentky, *Child Sexual Molestation*, at 8.

A large body of research supports the conclusion that a substantial portion of released sex offenders will reoffend. *See* Virginia Crim. Sent. Comm'n, *Assessing Risk*, at 17-18 (listing numerous studies). For example, a study, discussed more fully below, found that 115 treated child molesters had a 52 percent failure rate over a 25 year period when measured by a re-arrest for a new sex offense. *See* Robert Prentky *et al.*, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635, 643-44 (1997).[6] The same study tracked 136 rapists over the same period and found a 39 percent failure rate when measured by a re-arrest for a new sex offense. *Id.* at 635, 642-43. Another study of 191 child molesters (which followed 93% of the molesters for more than 15 years) found a 35% rate of reconviction for a new sex offense. R. Karl Hanson *et al.*, *A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism*, 32 J. Res. in Crime & Delinq. 325, 332 (1995). As demonstrated by these

[5] Between 1980 and 1992, "the number of adults convicted annually of rape, child molestation, or other forms of sexual assault more than doubled" from 8,000 to 19,100. *Managing Adult Sex Offenders*, at 1. Between 1980 and 1994, the number of sex offenders in state prisons increased from 20,500, to 88,100. *See id.*

[6] "Failure rate is an estimate [of recidivism] that takes into account the amount of time each offender has been on the street and thus able to reoffend." Prentky, *Recidivism Rates*, 21 Law & Hum. Behav. at 641. *See also* discussion *infra* at pp. 10-11 n.8.

studies, as well as the studies of self-reported victimizations, *see* discussion *supra* at pp. 6-7, state and local officials have a justifiably compelling concern that released sex-offenders will engage in recidivist acts.

This is not to deny the existence of research suggesting lower recidivism rates than those cited above, *see* Virginia Crim. Sent. Comm'n, *Assessing Risk*, at 17-18 (listing studies), or that the "[t]he literature on sex offenders shows considerable variability in estimates of recidivism rates." Prentky, *Child Sexual Molestation*, at 11. There are, however, substantial "methodological differences in existing studies." *Id.* at 10. Such factors as "differences in the definition of 'reoffense,' in the type of criminal offense indexed, and in the length of the exposure period being considered" contribute to "this variability." *Id.*

Most of these factors result in the *underestimation* of recidivism rates. For example, a study which measures recidivism based on convictions for a new sex offense will have lower rates than one which measures recidivism based on arrests. An offender, however, may be acquitted because witnesses "may refuse. . . to testify," or the charge may be "reduced in a plea agreement." Virginia Crim. Sent. Comm'n, *Assessing Risk*, at 7; *see also* Prentky, *Child Sexual Molestation*, at 11. Moreover, since many sex offenses are never reported to law enforcement authorities (and even if reported, the perpetrator may not be identified or caught), there is an inherent bias towards lower recidivism rates in most studies. *See* Prentky, *Recidivism Rates*, 21 Law & Hum. Behav., at 641. As the American Psychiatric Association's Task Force explains, "[s]exual offenses are grossly underreported, and for this reason most measures of recidivism or treatment outcome are flawed." American Psychiatric Association, *Dangerous Sex Offenders* 129 (1999); *see also id.* at 132-33 ("official arrest rates do not reflect the actual number of acts committed by any paraphilic individual").

Thus, while "rearrest rates and reconviction rates are frequently used, the most accurate, although potentially still flawed, outcome variable may be a combination of these rates and self-reported sexual behaviors that are present in only a few of the reported studies." *Id.* at 129.

Moreover, most studies use finite periods to calculate recidivism rates and express the rate as a "simple . . . proportion of individuals who have reoffended during the study period;" a shorter period will result in a lower rate as the study excludes those who reoffend after the end of the period. *See* Prentky, *Recidivism Rates*, 21 Law. & Hum. Behav., at 641.[7] Furthermore, because discharged offenders have different release dates and some offenders will commit new crimes and be re-incarcerated, all study subjects are not "on the street and thus able to reoffend" for the full study period. *Id.* Thus, recidivism studies which use "simple percentages" will "*underestimate* the rate of recidivism." *Id.*; *see also* Prentky, *Child Sexual Molestation*, at 11.

To show how many studies underestimate recidivism, one study followed 115 child molesters and 136 rapists who were released over a 25-year period from the Massachusetts Treatment Center for Sexually Dangerous Persons after "being found no longer sexually dangerous." Prentky, *Recidivism Rates*, 21 Law & Hum. Behav., at 637. In addition to using the traditional method of simple percentages, the study used survival analysis to determine the probability that a released offender would either be charged with, convicted of, or imprisoned for a new sex offense over the study period. *See id.* at 650; *see also* Prentky, *Child Sexual Molestation*, at 11-14. Using the arrest data, the study estimated that at 25 years there was a 52 percent failure rate[8] for committing a

[7] According to Prentky, four-fifths of the studies were based on a one-year period. Prentky, *Recidivism Rates*, 21 Law & Hum. Behav., at 636.

[8] As the Prentky study explains, "[r]ecidivism may be operationalized in a variety of different ways. . . . [T]he most common method is to report the simple proportion of individuals known to have reoffended during the study period." *Recidivism Rates*, 21 Law & Hum. Behav., at 641. "This method will *underestimate* the rate of recidivism, because some of those individuals who were in the community for a briefer period of time may still reoffend." *Id.* Another method is to calculate the failure rate, which "is an estimate that takes into account the amount of time each offender has been on the street and thus able to reoffend. . . . [P]rocedures that take into account time at risk (or exposure time) yield much more accurate estimates of recidivism." *Id.*

new sexual offense, with an average of 3.64 years before reoffense; using the conviction data, it estimated a 41 percent failure rate; and using the imprisonment data, it estimated a 37 percent failure rate.[9] *See Recidivism Rates*, 21 Law & Hum. Behav., at 643-44; *see also Child Sexual Molestation*, at 12-13.

Most significantly, the study found that "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release [and that] child molesters in [the] sample reoffended as late as 20 years following release." Prentky, *Child Sexual Molestation*, at 14. The study further concluded that if it "had been restricted to the conventional exposure period of 12 to 24 months, approximately 40 to 45 percent of new sexual charges would have been missed [and even] if followup had been extended to 60 months, 30 percent of new sexual charges would still have been missed." *Id.*[10] While the study's authors advise that the

[9] These failure rates compared with simple percentage rates of 32% for a new sex offense charge, 25% for a new sex offense conviction, and 23% for a new sex offense imprisonment. Prentky, *Recidivism Rates*, 21 Law & Hum. Behav., at 644. The use of a simple percentage thus resulted in underestimation of reoffense rates by 38 to 39%. *Id.* Twenty six percent of rapists were charged with a new sexual offense "with an average of 4.55 years . . . before reoffense." *Id.* at 642. The failure rate calculated on this basis was 39%. *Id.*

[10] Although not as pronounced, the study found with respect to rapists that if it had "restricted our follow-up to the convention[al]. . . period of

"marked heterogeneity of sexual offenders precludes automatic generalizations of [these] rates . . . to other samples," and that "actual rates may differ considerably depending on the composition of the sample," the authors nonetheless recognize "the proclivity of a core subgroup of sexual offenders to reoffend." Prentky, *Recidivism Rates*, 21 Law & Hum Behav., at 656. And as explained above, there are numerous other studies that suggest a similarly high rate of recidivism. *See id.* at 653.

Thus, while some sex offenders do not reoffend, many do. Predicting whether a particular sex-offender is likely to reoffend is, however, a matter of great complexity as there are numerous factors of both a static and dynamic nature that may be relevant in making the assessment. *See, e.g.*, R. Karl Hanson & Andrew Harris, Solicitor General of Canada, *Dynamic Predictors of Sexual Recidivism* 3 (1998) (available at http://www.sgc.gc.ca/epub/corr/e199801b/e199801b.htm). The difficulty is compounded by the inchoate nature of the criminological and scientific research. *See* R. Karl Hanson, Solicitor General of Canada, *The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism* 3 (1997) (available at http://www.sgc.gc.ca/epub/corr/e199704/e199704.htm) (noting that "[t]here have been few attempts to develop objective risk scales specifically for sexual offense recidivism").

There is substantial research which suggests that clinical assessments of sex offenders' dangerousness have low predictive accuracy. R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 Psychol., Pub. Pol'y, & L. 50, 54 (1998). One researcher writes that "[a]lthough clinical predictions of risk are routine in many fields, the

12 or 24 months, we would have erred by approximately 30% or 25%, respectively." Prentky, *Recidivism Rates*, 21 Law & Hum. Behav., at 645. Moreover, use of a five year period would still have resulted in "miss[ing] approximately 20% of the new charges." *Id.*

accuracy of these risk assessments has been unimpressive." *Id.* (citations omitted). In this expert's view, "[t]he clinical prediction of sexual offender recidivism is no exception." *Id.* Hanson and another expert have concluded that "the average predictive accuracy of professional judgment to predict sex offense recidivism is only slightly better than chance." R. Karl Hanson & David Thornton, Solicitor General of Canada, *Static 99: Improving Actuarial Risk Assessments for Sex Offenders* (1999) (available at http://www.sgc.gc.ca/epub/corr/e199902/e199902.htm); *see also* Hanson, *Sex Offender Risk Assessment*, 4 Psychol., Pub. Pol'y, & L., at 54.[11]

Moreover, while it has been suggested that actuarial methods of risk assessment are superior to clinical prediction, *see* Virginia Crim. Sent. Comm'n, *Assessing Risk*, at 14 (summarizing literature), "[a] longstanding controversy exists within the field of psychology over the relative merits of actuarial (or statistical) versus clinical predictions." Thomas R. Litwack, *Actuarial Versus Clinical Assessments Of Dangerousness*, 7 Psychol., Pub. Pol'y, & L. 409 (2001). In any event, although "researchers have made significant advances

[11] There is some evidence suggesting that clinical assessments which are structured to review a standardized list of risk factors have substantially greater predictive accuracy than unguided clinical assessments. *See* Hanson, *Sex Offender Risk Assessment*, 4 Psychol., Pub. Pol'y, & L., at 55. Hanson found an average correlation of .23 for guided clinical assessments versus a correlation of .07 for unguided assessments. *See id.* There is, however, "no explicit method of translating combinations of individual risk factors into overall recidivism probabilities" and "[n]one of the individual risk factors are sufficiently discriminating to justify their use in isolation." *Id.* at 62.

"Correlation coefficients can range from –1 to +1, with 0 indicating no predictive accuracy and values farther from 0 indicating greater predictive accuracy." *Id.* at 53. Thus a correlation of +1 indicates a perfect positive correlation between variables and –1 indicates a perfect negative correlation.

in risk assessment procedures" with respect to the prediction of "general criminal recidivism," Hanson, *Sex Offender Risk Assessment*, 4 Psychol., Pub. Pol'y, & L., at 50, "these general measures have not been particularly effective in predicting sexual recidivism" of individual offenders. *Id.* at 52. In part, this is because "[t]here has been relatively little empirical research on how best to combine risk factors for sexual offenders." *Id.* at 62; *see also id.* at 63-64 (discussing use of various actuarial scales).

The current actuarial methods—which rely principally on static factors—have at best moderate predictive accuracy with respect to sex offenses.[12] *Id.* at 63-64. These scales, however, "cannot even claim to address all the relevant static risk factors," *id.* at 65, and "a reliable set of dynamic risk factors has yet to be established." *Id.* at 68. As Hanson further explains, "[t]he research on dynamic risk factors for sexual offenders is just beginning, and many of the effects need to be replicated before they can be confidently used to predict risk." *Id.* Thus, "the research on actuarial measures for sexual offense recidivism has yet to demonstrate a clear superiority to the best clinical assessment methods." *Id.* at 53.

Moreover, in the views of another researcher, "there is no reliable body of empirically derived data that can inform and guide decisionmaking about reoffense risk." Prentky, *Child Sexual Molestation*, at 9. In any event, "[t]he prediction of future behaviour can never be done with certainty since people and circumstances can and do change." Hanson, *Development of a Brief Actuarial Risk Scale*, at 2.

As the foregoing demonstrates, the prediction of recidivism by individual sex offenders is fraught with uncertainty. It is thus precisely the type of area where "'legislative options

[12] The correlations range from .20 to .33. *See* Hanson, *Sex Offender Risk Assessment*, 4 Psychol., Pub. Pol'y, & L., at 63-64.

must be especially broad and courts should be cautious not to rewrite legislation.'" *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)); *see also Jones*, 463 U.S. at 364 n.13 ("The lesson we have drawn is not that government may not act in the face of . . . uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.").

State legislatures are not required to wait for the scientific and criminal justice communities to analyze conclusively every category of sex offense and every nuance of the problem of recidivism and compile more perfect data-sets. A State can thus reasonably choose to protect its citizens by making relevant sex offender information accessible to the public without conducting individualized risk assessments. As explained below, doing so does not implicate constitutionally protected liberty and thus does not trigger the protections of the Due Process Clause.

II. PUBLIC ACCESS TO SEX OFFENDER REGISTRATION INFORMATION DOES NOT IMPLICATE PROCEDURAL DUE PROCESS

The court of appeals held that respondents, who have been duly convicted of serious sex offenses, have a federally protected liberty interest under the Due Process Clause which entitles them to a hearing to assess whether "they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry." Pet. App. 39a. The court thus upheld the district court's injunction "prohibit[ing] the [State] from 'disclosing or disseminating to the public, either in printed or electronic form . . . the Registry or . . . Registry information concerning'" convicted sex offenders. *Id.* at 38a. (quoting Dist. Ct. order).

As explained below, this holding is erroneous for several reasons. First, the concept of liberty as recognized by this

Court's Due Process jurisprudence does not encompass the right of convicted felons to suppress truthful information regarding their criminal histories from the public. Indeed, the court of appeals' recognition of such a liberty interest cannot be squared with the longstanding right of public access to the records of judicial proceedings. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

Second, even assuming that making sex offender registration information available to the public stigmatizes sex offenders by falsely implying that all are "currently dangerous" when some are not, Pet. App. 18a, the injury does not amount to the deprivation of a constitutionally protected liberty interest. The court's assertion that the registration requirement can be coupled with the putative stigmatic injury to establish a deprivation of a liberty interest is likewise misplaced.

Finally, the court's requirement of individual hearings to determine whether an offender is "currently dangerous" is problematic in several respects. It ignores that some sex offenders reoffend many years after their release and that predictions of sex offender recidivism cannot be made with a high degree of accuracy. The judgment of the court of appeals should therefore be reversed.

A. A Convicted Sex Offender Does Not Have A Liberty Interest In Preventing Public Dissemination Of Registry Information

1. "The Due Process Clause . . . forbids arbitrary deprivations of liberty." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Making sex offender registration information accessible to the public is neither arbitrary governmental action, nor deprives a duly convicted sex offender of liberty.

"Sex crimes flourish in secrecy [and] [s]ex offenders have secretive and manipulative lifestyles." English, *Managing*

Adult Sex Offenders in the Community, at 2. "Many sex offenders are otherwise highly functioning people who use their social skills to commit their crimes." *Id.* Moreover, in several studies sex offenders have admitted to "vastly more" criminal paraphilic acts "than those for which they were convicted." Prentky, *Child Sexual Molestation*, at 1. "The vast majority of sex offenders are released eventually" to the community, *id.* at 8, where they are presented with the opportunity to reoffend. "[M]anag[ing] sex offenders in the community to contain them" is thus essential to protect the offenders' previous victims and to prevent new victimizations. English, *Managing Adult Sex Offenders in the Community*, at 2.

Connecticut's Sex Offender Registration Law protects public safety in three critical ways. First, it alerts authorities to the presence of a sex offender in their jurisdiction. Second, it alerts the sex offender to the fact that the authorities know where the offender lives and works. Third, by making registration information publicly accessible, it enables citizens to protect themselves and their families by determining whether a sex offender lives in their neighborhood. Relatedly, it enables citizens to determine whether persons engaged in volunteer activities such as youth groups and sports programs have a history of sex offenses. Registration and public access to registration information thus reduces the ability of an offender to operate in secrecy, an environment conducive to the commission of new sex offenses. *See id.* at 2. Connecticut's statute is thus a rational and justified response to the extraordinary problem of sex offender recidivism.

The State's publication of sex offender registration information does not implicate a liberty interest protected under the Due Process Clause. While "there exists a variety of interests which are . . . comprehended within the meaning of . . . 'liberty,'" and these interests can have their source in both

state and federal law, *Paul v. Davis*, 424 U.S. 693, 710-11 (1976), neither statutory nor constitutional law creates any right or legitimate expectation on the part of a sex offender in preventing public access to registration information. Publication of sex offender information, by itself, does not involve a governmental restraint on a sex offender's freedom of action or result in the "denial of any right vouchsafed to him by the State." *Id.* at 712. At most, it implicates a stigmatic injury, which the Court has repeatedly held does not deprive one of constitutionally protected liberty.

2. Under the Connecticut act, the sex offender registry is "a public record" which is "accessible to the public during normal business hours" and "registry information [is] available to the public through the Internet." Conn. Gen. Stat. § 54-258(a)(1) (Pet. App. 97a). Before the district court ordered the State to "take down the Registry website and cease making publicly available the Registry information," Pet. App. 69a, members of the public were "able to search the database by zip code or town name, which produced a list of all registrants within the scope of the search, or by last name or first letter thereof." *Id.* at 9a. For each name obtained in the initial search, a link to each registrant's information was provided. *See id.* As the district court found, "this page contain[ed] the registrant's name, offense, current residence address, physical description and photograph." *Id.* at 47a.[13]

[13] The web site also included a disclaimer explaining that the State "has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous." Pet. App. 9a. The web site further warned that use of registration information "to injure, harass, or commit a criminal act against any person included in the registry . . . is subject to criminal prosecution." *Id.* at 9a-10a.

The State's publication of this information does not implicate a constitutionally protected liberty interest. As this Court has explained, "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon*, 435 U.S. at 597 (footnotes omitted); *see also* 20 Am. Jur.2d *Courts* § 32 (2002) ("Court records are generally open to inspection by the public."). This common law right, "which antedates the Constitution and which is applicable in . . . criminal . . . cases," *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993), clearly authorizes public access to the judgments of criminal courts and records of criminal convictions. Indeed, by statute Connecticut specifically recognizes the public's right of access to the records of criminal convictions. *See* Conn. Gen. Stat. § 54-152g(a)-(c); § 54-142k(b).

Nor does the publication of a sex offender's photograph or current address implicate a constitutionally protected liberty interest. The flyer at issue in *Paul* included the plaintiff's photograph. *See* 424 U.S. at 695. Publishing the photograph did not deprive the plaintiff of a protected liberty interest. *See id.* at 712.

Likewise, addresses are found in numerous public records such as voting, motor vehicle and property tax records. While a State can protect address information from public disclosure, there is no constitutional requirement that it do so. Rather, whether such information should be protected from disclosure is a legislative policy decision. *See, e.g.*, 18 U.S.C. §§ 2721-2725 (Driver's Privacy Protection Act).[14] And even

[14] The Driver's Privacy Protection Act, for example, restricts state motor vehicle agencies from disclosing personal information including drivers' names, addresses, and photographs "obtained . . . in connection with a motor vehicle record." 18 U.S.C. § 2721(a). The Act, however,

if a State once recognized the right of convicted criminals to protect such information from disclosure, the Due Process Clause would not require the State to provide hearings following a legislative change of policy. *See Bi-Metallic Invest. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *see also Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961). Connecticut's publication of registration information thus does not deny sex offenders "any right vouchsafed to [them] by the State." *Paul*, 424 U.S. at 712.

Indeed, were this so the release of information pursuant to the State's public records act would also trigger the right to a hearing. Yet the district court expressly stated that its order did not "affect the public's ability to obtain individual criminal conviction history records pursuant to" the Connecticut statutes. Pet. App. 69a. That the State chooses to make public records more easily accessible to its citizens through the use of the Internet is not constitutionally significant. As the Tenth Circuit has explained, the Internet "works merely a technological extension, not a sea change, in our nation's long history of making information public regarding criminal offenses." *Femedeer v. Haun*, 227 F.3d 1244, 1251 (10th Cir. 2000).

3. Contrary to the view of the court of appeals, the State's compiling sex offender information in a central registry and making that information available to the public does not alter this conclusion. At most, the disclosure of registration information states an injury to the reputation of sex offenders,

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authorizes disclosure for numerous purposes. *See id.* § 2721(b)(1)-(14). If the Due Process Clause created a liberty interest in non-disclosure of personal information, the Act would clearly be unconstitutional.

an injury which does not "state a claim for denial of a constitutional right" under *Paul*. *Siegert v. Gilley*, 500 U.S. 226, 233-34 (1991).[15]

While the court of appeals acknowledged that stigma alone is not enough to state a deprivation of protected liberty, the court held that the registration obligations "easily qualify as a 'plus' factor under *Paul*." Pet. App. 31a. The court so held

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[15] According to the court of appeals, the State's "publication of the registry implies that each person listed is more likely than the average person to be currently dangerous. . . . This implication stigmatizes every person listed on the registry[,]" and is false in the case of some registrants. Pet. App. 18a. Contrary to the view of the court below, studies show that previously convicted sex offenders are far more likely to commit a sex offense than are "average persons." According to a Justice Department report, which followed prisoners released from state institutions for a three-year period, "[r]eleased rapists were 10.5 times more likely than non-rapists to have a subsequent arrest for rape[,]" and "[p]risoners who had served time for other sexual assaults were 7.5 times more likely than those who had not served time for sexual assault to be arrested for a new sexual assault." Allen J. Beck & Bernard E. Shipley, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 1983* 6 (rev. ed. 1997). Given that the sex offenders studied in this report were arrested for a new sex offense at a far greater rate than other released prisoners, it is rational to conclude that the rate would be even greater if the comparison were made with "average persons." Publication of the registry thus does not falsely stigmatize sex offenders, but rather merely relates a statistical fact that is true with respect to sex offenders as a class.

The court of appeals' further suggestion that sex offenders incur a legally cognizable stigmatic injury, that is proximately caused by the State's publication of the registry, is mistaken. This Court has long recognized that a conviction for a serious crime has the consequence of stigmatizing the offender. *See Reno v. ACLU*, 521 U.S. 844, 872 (1997) (referring to "the opprobrium and stigma of a criminal conviction"); *In re Winship*, 397 U.S. 358, 363 (1970) (noting "the certainty that [one found guilty of criminal behavior] would be stigmatized by the conviction"); *see also Hawker v. New York*, 170 U.S. 189 (1898). A sex offender's criminal trial is a public proceeding; the subsequent conviction is public record. To the extent there is any stigma, it is caused by these events and not the State's publication of truthful information.

notwithstanding that its hearing requirement would do nothing to remedy the intrusion of liberty it found was caused by the registration requirement, but rather would address only the injury to reputation caused by the State's publication of sex offender registration information. *Id.* at 33a-34a. This reasoning is a misreading of *Paul* and the Due Process Clause.

In *Paul*, the Court held that police distribution of a flyer, which identified the plaintiff as an "active shoplifter," 424 U.S. at 695, did not deprive the plaintiff of liberty protected by the Due Process Clause. *See id.* at 712. The *Paul* Court acknowledged that some language in earlier decisions was "sufficiently ambiguous" so as to suggest that injury to reputation "standing alone" would deprive one of protected liberty. *Id.* at 707, 709. The Court explained, however, that in each such case the state action had caused the "alter[ation] or extinguish[ment]" of "a right or status previously recognized by state law." *Id.* at 711.

For example, the posting at issue in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), had the further statutory consequence of denying the plaintiff the right to purchase alcoholic beverages, a right which others citizens of legal age possessed. As *Paul* explained, "'[p]osting,' therefore, significantly altered [Constantineau's] status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." 424 U.S. at 708-09. *See also id.* at 710 (in *Board of Regents v. Roth*, 408 U.S. 564 (1972), "it was not thought sufficient to establish a claim . . . that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment"); *id.* (in *Goss v. Lopez*, 419 U.S. 565 (1975), the Court "took care to point out that Ohio law conferred a right upon all children to attend school, and that the act of the school officials suspending the student . . . resulted in a denial or deprivation of that right").

The Court reaffirmed these principles in *Siegert*. There the Court held that a defamatory letter written by a government official did not implicate a protected liberty interest because it was not written "incident to the termination of Siegert's employment" but rather was written "several weeks" after he had "voluntarily resigned" his position at a government hospital. 500 U.S. at 234. While acknowledging that "[t]he statement contained in the letter would undoubtedly damage the reputation of one in [Siegert's] position, and impair his future employment prospects," the Court explained that damage caused by such injuries "may be recoverable under state tort law but it is not recoverable in a *Bivens* action." *Id.*

As these cases demonstrate, injury to reputation alone does not implicate a constitutionally protected liberty interest. Rather, it is the existence of the "plus factor"—i.e., the State's deprivation of some constitutional right or protected interest—that triggers the protections of the Due Process Clause. *See Paul*, 424 U.S. at 711-12. While one may choose to use the hearing to redress the injury to one's reputation caused by a defamatory act, such redress is ancillary to the hearing's purpose, which is to prevent arbitrary deprivations of a protected interest or constitutional right. Absent the latter, there is no right to a hearing to redress an injury to reputation. The court of appeals' suggestion that its cases "have not required the plaintiff to seek a remedy for both the stigma and the 'plus' factor," Pet. App. 34a, simply ignores that there must be a deprivation of a protected liberty interest for one to be entitled to any hearing at all.[16]

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[16] In support of this assertion, the court of appeals cited two decisions: *Donato v. Plainview-Old Bethpage Cent. School Dist.*, 96 F.3d 623 (2d Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997), and *Brandt v. Board of Cooperative Ed. Servs.*, 820 F.2d 41 (2d Cir. 1987). *See* Pet. App. 34a. Both of these cases, however, involved the termination of public

Significantly, the "plus" factor cited by the court of appeals—the imposition of the registration obligation—does not arise because the State published sex offender information. Moreover, the registration requirement is not triggered by a potentially arbitrary act of an executive branch official that materially alters or extinguishes some existing right or interest. Rather, it is an independent requirement of a legislative scheme applicable to a large class of people. *See, e.g.*, *Bi-Metallic Inv. Co.*, 239 U.S. at 445. As a leading authority explains, "[p]rocedural due process does not apply when government makes a policy decision that has an adverse impact on an entire classification of individuals or firms . . . even if the decision has the same adverse effect on the interests of the members of the group as would an individualized deprivation." II Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.2, at 3 (3d ed. 1994); *see also Quesada*, 276 F.2d at 896 (FAA regulation revoking pilots' licenses at age sixty without a hearing did not violate due process).

Indeed, registration is a common regulatory tool that is used in a variety of contexts. *See* 50 U.S.C. App. § 453 (2002) (Selective Service); 2 U.S.C. § 1603(a)(1) (2002) (lobbyists); 22 U.S.C. § 612(a) (2002) (foreign agents); http://www.nonprofits.org/library/gov/urs/#yes_states (listing

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employment and relied on *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). *See Donato*, 96 F.3d at 633; *Brandt*, 820 F.2d at 43. The Court explained in *Paul* that "[w]hile *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment." 424 U.S. at 709; *see also id.* at 710 (not "sufficient to establish a claim under section 1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment").

States requiring registration of charitable solicitors). As long as a registration scheme does not burden fundamental rights or a protected class, its legislative imposition does not implicate a protected liberty interest and the right to a hearing to determine whether one can be subjected to it.

In any event, the State's registration requirement cannot be deemed a "plus factor" because even if the obligations of registration and periodic verification amount to a deprivation of liberty, each registrant has been provided pre-deprivation process in the form of a criminal trial. At trial, sex offenders are accorded the most substantial protections recognized by the Constitution, including the right to be represented by counsel, the right to confront and cross-examine all witnesses, the right to an impartial jury, and the requirement that the State prove beyond a reasonable doubt every element of the offense. *See* U.S. Const. Amend. VI; *In re Winship*, 397 U.S. 358, 364 (1970).

"[T]he deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of* law." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (citing *Parratt v. Taylor*, 451 U.S. 527, 537 (1981)). As the Court has further explained, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

A State can reasonably conclude that a sex offender's obligation to register can be triggered by a judicial determination that the offender committed a sex offense and not by the additional and indeterminate "finding" that the offender is "currently dangerous." Because the State, through a criminal trial, has already provided sex offenders with an adequate remedy to protect against unjustified impositions of the registration obligation, further hearings are not required. *Cf.*

Dixon v. Love, 431 U.S. 105, 113-14 (1977) (upholding summary revocation of driver's license based on judicial convictions for traffic offenses). The registration obligation is thus not a valid "plus factor" under *Paul*; the sex offenders' claim states at most an injury to reputation that is not actionable under the Due Process Clause.

B. The Court of Appeals' Hearing Requirement Is Problematic

There are additional reasons for reversing the court of appeals' holding that Connecticut is constitutionally required to provide hearings to determine whether sex offenders "are particularly likely to be currently dangerous" before making their registration information publicly accessible. Pet. App. 39a. As explained below, the court's hearing requirement would undermine public safety while doing little to redress the purported stigmatic injury incurred by sex offenders.

The court of appeals' standard of whether an offender is "particularly likely to be currently dangerous," *id.*, is problematic in several respects. First, while this inquiry might have some relevance if the State was attempting to commit an offender to a treatment facility, *cf. Hendricks*, 521 U.S. at 357-58, it should not be judicially imposed when the interest at stake does not involve a restraint on liberty but rather the interest of convicted sex offenders in avoiding the implied stigma allegedly created by a State's compilation of truthful information in a publicly accessible database.

More significantly, while the standard appears to require an estimation of an offender's probability of reoffense, the prediction of sex offender recidivism is an area of great complexity and uncertainty. As explained previously, sex offender recidivism research indicates that reported recidivism rates are widely acknowledged to substantially underreport the actual level of reoffending. *See* discussion *supra*, at pp. 5-7. It is unwarranted to require a State to hold a

hearing to assess the probability of an offender's reoffending when the statistical basis for making the prediction—the actual base rates of sex offender recidivism—are unknown and reported rates are believed to widely underestimate the level of reoffending.

Moreover, social science research indicates that the available methods of predicting sex offender recidivism have only moderate predictive accuracy and thus have substantial error rates. *See* Hanson, *Sex Offender Risk Assessment*, 4 Psychol., Pub. Pol'y, & L., at 63-64. As explained previously, clinicians' predictions of sex offender recidivism have poor predictive accuracy, *see id.* at 54, "[t]he existing actuarial scales cannot even claim to address all the relevant static risk factors," *id.* at 65, and "a reliable set of dynamic risk factors has yet to be established." *Id.* at 68. When clinicians cannot accurately predict the likelihood of reoffense and "there is no reliable body of empirically derived data that can inform and guide decisionmaking about reoffense risk," Prentky, *Child Sexual Molestation*, at 9, individualized hearings would serve no purpose.

Additionally, the court of appeals' view that a hearing should be limited to assessing whether an offender is "currently dangerous" would jeopardize public safety. The court's standard ignores that "most reoffenses do not occur within the first several years after release" and that some sex offenders have been found to reoffend more than twenty years following their release. *Id.* at 14. Moreover, the court's formulation reflects a misunderstanding of the dynamics of sex offender recidivism. Even if such a hearing could determine an offender's risk at a particular point in time, it could not possibly predict future changes in an offender's post-hearing environment and other circumstances that may result in the offender committing a new sex offense.

For example, an offender might become a substance abuser, have an increase in deviant sexual urges, or have

greater access to potential victims, all of which are dynamic risk factors for reoffense. *See* Hanson & Harris, *Dynamic Predictors of Sexual Recidivism*, at 16-18, 21. Moreover, as Hanson and Thornton explain, "[a]n offender with a 10% chance of sexual recidivism over 15 years may be [a] good candidate for conditional release (i.e., 'low' risk), but an *unacceptably high risk* for holding positions of trust over children." *Improving Actuarial Risk Assessments for Sex Offenders*, at 16 (emphasis added).[17]

Thus, even offenders classified as "low risk" can reoffend. While the court of appeals expressly declined to address whether a State could make publicly available information about those offenders determined "not to be currently dangerous," Pet. App. 39a, each possible alternative demonstrates the problematic nature of the court's holding. If such information cannot be made publicly available, public safety will be jeopardized because potential victims—and those responsible for protecting them—will have been denied important information about the offender.

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[17] Contrary to the views of respondents (*see* Opp. at 26), *Schall v. Martin*, 467 U.S. 253 (1984), is inapposite. *Schall* involved non-sexual criminal conduct. *See* 467 U.S. at 257-60. As explained above, although "researchers have made significant advances in risk assessment procedures" with respect to the prediction of "general criminal recidivism," Hanson, *Sex Offender Risk Assessment*, 4 Psychol., Pub. Pol'y, & L., at 50, "there appear to be some differences between the factors that predict sexual offenses and the factors that predict other types of violence." *Id.* at 50-51. Thus, the measures used to predict general criminal recidivism "have not been particularly effective in predicting sexual recidivism." *Id.* at 52.

To be sure, the most dangerous sexual offenders can be determined with a high degree of predictive accuracy. But "setting a high threshold, while reducing the rate of false positives, will likely lower the rate at which recidivists are accurately identified" by the assessment tool. *See* Virginia Crim. Sent. Comm'n, *Assessing Risk*, at 91. In other words, there will be a substantial error rate with respect to those predicted "not to be currently dangerous."

The other possibility—that public disclosure is permissible so long as the State indicates that the offender has been assessed as a "low" or "moderate" risk—presents additional problems. Limiting the amount of information made publicly available by stating that an offender has been determined "not to be currently dangerous" risks misleading the public as to the potential risk the offender poses in certain situations. If, however, the State's registry were to list the specific situations in which a low risk offender poses a high risk, then the offender is further stigmatized. *See, e.g.*, Hanson & Thornton, *Improving Actuarial Risk Assessments*, at 16. Classifying offenders as "low" or "moderate" risk thus could be more stigmatizing than the system used by Connecticut and many other States.

* * * *

The court of appeals disregarded this Court's settled instruction that "when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" *Hendricks*, 521 U.S. at 360 n. 3 (quoting *Jones v. United States*, 463 U.S. at 370). Connecticut's Sex Offender Registration Act is a reasonable legislative response to the problems inherent in predicting sex offender recidivism. The State's declination to provide risk-based assessments of registrants does not implicate any interest protected by the Due Process Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the
SUPREME COURT OF THE UNITED STATES

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, ET AL., *Petitioners*,

v.

JOHN DOE, SAMUEL POE, *Respondents*.

On Writ of Certiorari To The
United States Court of Appeals For The Second Circuit

BRIEF OF THE OFFICE OF THE PUBLIC DEFENDER FOR THE STATE OF NEW JERSEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did the court of appeals correctly hold that Connecticut's sex offender registration and community notification law violates the Fourteenth Amendment by requiring broad community notification which falsely suggests, for each sex offender who is subject to the law, that he is likely dangerous, and by imposing extensive registration requirements which alter the legal status of these persons without affording them notice and a hearing on the question of whether they are dangerous?

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INTEREST OF *AMICUS CURIAE*[1]

This case concerns the constitutionality, under the Fourteenth Amendment of the United States Constitution, of the Connecticut Sex Offender Registry Act. Conn. Gen. Stat. §§ 54-250-261 (2001), *amended by* 2001 Conn. Legis. Serv. 01-84 (West).

In October 1994, acting in response to the sexual assault and murder of a seven-year-old girl, Megan Kanka, New Jersey enacted a sex offender registration and community notification law that came to be known as "Megan's Law." Other states, including Connecticut, and the federal government followed suit. A number of the jurisdictions that enacted these laws adopted due process procedures which afford the persons subject to the laws ("registrants") with notice and the opportunity for a hearing to determine whether, or to what extent, those persons currently pose a risk to the community.

Amicus is an entity which represent registrants in their challenges to the Megan's Law registration and notification proposed for them by the state. *Amicus'* extensive experience with Megan's Law systems, which include due process protections, places *amicus* in a unique position to provide this Court with information concerning

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[1] All parties have consented to the appearance of *amicus curiae* in this matter, and letters of consent have been lodged with the Clerk, pursuant to Supreme Court Rule 37.6. Counsel for *amicus* states that this brief was not authored in any part by counsel for any party. No person or entity other than *amicus* and their counsel made a monetary contribution to the preparation and submission of this brief.

the importance and the efficacy of such procedures.[2] In addition, considering that this Court's ruling could impact the registrants who are represented by the *amicus*, we have a clear interest in presenting the Court with information and arguments that bear upon our clients' constitutional rights.

[2] *Amicus* has lodged with the Court a number of affidavits from attorneys from a number of states who are experienced in the representation of indigent offenders in administrative and court proceedings relating to risk classification and community notification.

SUMMARY OF ARGUMENT

The court of appeals correctly ruled that a sex offender registration and notification law which ignores entirely the important distinctions among sex offenders, and denies those offenders any opportunity to challenge the accuracy of the clear message conveyed by community notification – *i.e.*, that they are currently dangerous – violates the Fourteenth Amendment of the United States Constitution.

Community notification laws typically cover a broad range of offenses and offenders. Within that broad range are offenders who present vastly different levels of risk. A substantial number of persons who have committed a sex offense at some point in their lives present little or no current risk of reoffense.

The experience of the states that have adopted a risk-based approach demonstrates it is possible to rationally categorize offenders according to their relative degrees of risk. Actuarial risk assessment tools are commonly used and may assist in bringing a degree of standardization and uniformity to the process. In many cases, the level of risk presented by the offender is readily apparent.

However, even where standardized risk assessment tools are used, errors frequently occur. It is therefore essential that registrants be provided with notice of a proposed risk classification and the opportunity for a hearing. These requirements can be satisfied without imposing an undue burden on the state.

To summarize, from the perspective of those who

have participated in a system in which community notification is tied to a risk determination, and due process is afforded to ensure that the risk determination is accurate, the "one size fits all" approach that has been adopted in Connecticut and some other jurisdictions is unnecessary and grossly unfair.

ARGUMENT

THE EXPERIENCE OF STATES THAT HAVE ADOPTED A RISK-BASED APPROACH TO COMMUNITY NOTIFICATION, COUPLED WITH NOTICE AND HEARING REQUIREMENTS, DEMONSTRATES THAT THIS TYPE OF APPROACH IS NECESSARY AND PRACTICAL.

A. An Offense-Based Approach Ignores Clear and Dramatic Differences Among Offenders, and Unfairly Stigmatizes Many Offenders Who Present Little or No Risk of Reoffense.

The 1994 murder of a young child by a repeat pedophile who lived across the street sparked a firestorm of public reaction that led to the enactment of sex offender registration and community notification laws in all fifty states and the District of Columbia. Since their inception, these laws have been justified by false or exaggerated claims – which are accepted without hesitation – that sex offenders are "incurable" criminals who are virtually certain to reoffend.[3] These statutes are premised on the assumption that notifying the community of the conviction history of such offenders and their current whereabouts will help to

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[3]Such claims are echoed in a number of inaccurate statements in the briefs filed in support of petitioners in this case and in *Smith v. Doe* (No. 01-729), concerning sex offender recidivism rates. *But see* Brief of the Massachusetts Committee For Public Counsel Services as *Amicus Curiae* in Support of Respondents, and Brief of the Office of the Public Defender of the State of New Jersey, *et al.*, as *Amici Curiae* in Support of Respondents, at 23-24 n.7, filed in *Smith v. Doe*.

prevent additional sex offenses.

Although prompted by the threat posed by a specific type of offender – the repeat-offender pedophile who preys upon children from outside his own home – the notification laws that were enacted cover a broad range of offenses and offenders. They may include everything from less serious offenses that result in a non-custodial sentence, to very serious crimes for which lengthy prison sentences are imposed. Both violent and consensual offenses may be included. Offenses against both children and adults fall within the laws, as do offenses against victims who resided within the offender's own household.[4] In terms of offenders, a one-time offender who has led a law-abiding life for many years may be covered, as is a repeat offender who has just been released from prison. Offenders who express genuine remorse and have spent years of work in treatment are included, along with the offender who shows no remorse or inclination to change. Many states subject juveniles to community notification. United States Department of Justice, Center for Sex Offender Management ("CSOM"), *Community Notification and Education*, at 5 (April 2001).[5]

These differences often translate into levels of risk for reoffense that vary greatly from one offender to another. In many instances, these differences are self-evident – *e.g.*, the just-released unreformed repeat offender

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[4]In Ohio, persons convicted of non-sex offenses are subject to that state's community notification law if the court determines at sentencing that the motive for the offense was sexual gratification. (Lane Dec. ¶ 3.)

[5]This article and other CSOM publications cited in this brief are available at www.csom.org.

clearly presents a much higher risk than the one-time offender who obtained treatment and has remained offense-free for many years. A number of formal studies of sex offender recidivism confirm that rates of recidivism vary greatly among different categories of offenders. *See* CSOM, *Myths and Facts About Sex Offenders*, at 2 (August 2000), (citing various studies and noting: "Persons who commit sex offenses are not a homogeneous group, but instead fall into several different categories. As a result, research has identified significant differences in reoffense patterns from one category to another.").

Recognizing the substantial distinctions among the persons who are potentially subject to community notification, and that failing to distinguish the truly dangerous offenders from the thousands who are very unlikely to reoffend dilutes any public safety benefit to be derived from community notification, many states require that community notification be tied to an offender-specific risk determination.

In the states where community notification is tied to the risk presented, rather than simply to whether the offender has committed an offense covered by the notification statute, some offenders are excluded from notification because it is readily apparent they present no significant risk of reoffense. The registrants exempted from notification may include offenders who committed relatively minor offenses many years ago and have since turned their lives around, or offenders whose current physical condition suggests a greatly reduced risk of reoffense. (*See* Buncher Dec. ¶ 33; registrant who was paralyzed from the waist down, rendered impotent and confined to a wheelchair); (Gallo Dec. ¶ 10; registrant who was in a vegetative state as a result of

injuries).

When given the opportunity to do so, the courts have recognized that certain categories of sex offenders raise special considerations and may not be appropriate for community notification. For example, in applying New Jersey's notification law, the courts there have recognized that circumstances pertaining to the particular offender may have more bearing than the fact of the underlying conviction. In *In re Registrant J.G.*,169 N.J. 304, 337 (2001), the Court held that special considerations may need to be taken into account in cases where the offender was a child at the time of his offense. The Court concluded that "[i]n many instances, sexually improper behavior by such young children is more a reflection of inadequate adult supervision, immaturity, inappropriate media exposure, or a prior history of emotional abuse than it is of irremediable sexually predatory inclinations." *Id.* at 340. Thus, the court stressed that the offender's young age must be taken into account in any risk assessment, and provided a mechanism by which such offenders can apply to be excused from the requirements of Megan's Law. *Id.* at 333-34, 340.

Courts have also recognized that widespread community notification – potentially for the remainder of the offender's life – may be inappropriate where the underlying offense involved an immature young adult having consensual sexual relations with an underage teenage girlfriend. *See* Johnson Dec. ¶ 7; Donovan Aff. ¶ 13; *In re Registrant E.I.*, 300 N.J. Super. 519, 526 (App. Div. 1997). As the *E.I.* court noted, a "mechanical" application of a notification law to all cases will "impede [its] beneficial purpose." *Id.* at 526.

Similarly, there has been a recognition that it is important to consider the *nature* of the risk presented by the offender. In *In re Registrant R.F.*, 317 N.J. Super. 379 (App. Div. 1998), *approved in part, disapproved, in part, on other grounds*, *In re Registrant M.F.*, 169 N.J. 45 (2000), the Appellate Division concluded that a registrant who limited his offending behavior to a victim within his own household, and did not seek out victims in the community-at-large, may not present a risk of the type community notification is designed to address.[6] Thus, no community notification may be necessary in such a case. *Id.* at 392.[7] Similarly, where an offender has no history of offending against children, and has not otherwise shown any inclination towards such conduct, there is little reason to provide community notification to day care centers and elementary schools. *See In re Registrant M.F.*, 169 N.J. 45, 63 (2001); (Lane Dec. ¶ 9.).

The number of sex offenders who fall within these low-risk subcategories, or otherwise present little risk of reoffending, is not small. In New Jersey, for example, prosecutors opt not to seek notification in approximately one-third of the cases that fall under the statute. (Buncher Dec. ¶ 22.) Had New Jersey adopted an offense-based system, these low risk offenders – of whom there are over two thousand – would have been subjected to unnecessary

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[6]Publication of an intra-familial offender's name may also bring embarrassment and additional harm on that offender's family member/victim.

[7]This ruling is bolstered by many studies which have concluded that incest offenders present little risk of reoffense. *See, e.g.*, CSOM, *Recidivism of Sex Offenders* (May 2001) (citing study which found a 4% rate of recidivism for incest offenders).

community notification.

In summary, experience has shown that sex offenders are a highly heterogeneous group, and that this diverse group includes many offenders who present little or no risk of reoffense. Inundating the public with notification concerning these thousands of low risk offenders only frustrates the goals that community notification is designed to serve. Such over-broad notification is especially egregious when one considers the harsh consequences – the vigilantism (or fear of it), the harassment, the loss of housing and employment – that registrants suffer when subjected to Megan's Law notification. (*See* Brief of *Amici* Office of the Public Defender for the State of New Jersey, *et al.*, filed in *Smith v. Doe* (No. 01-729).)

B. Appropriate Procedures Can Be Implemented To Classify Registrants According to Risk, And These Procedures Are Not Unduly Burdensome.

The experiences of the states which have adopted a risk-based approach demonstrate that efficient procedures can be implemented both to classify registrants according to risk, and to provide those offenders an opportunity to be heard concerning the proposed classification. Consider, for example, the experience of New Jersey – the state that is generally recognized as the birthplace of community notification laws.

New Jersey's Megan's Law was enacted in October 1994. Persons convicted, adjudicated delinquent, or found not guilty by reason of insanity of a "sex offense" are subject to its requirements. N.J. Stat. Ann. 2C:7-2. The law

includes persons who committed less serious offenses that resulted only in a sentence of probation, as well as offenders who at the time of sentencing were found, by the court and/or the expert who examined them, to require treatment in New Jersey's sex offender treatment facility.

The registration aspect of Megan's Law requires that "repetitive, compulsive" sex offenders register every ninety days; all other sex offenders must register annually. The extent of community notification for a given registrant depends on his determined risk of reoffense. For high risk ("Tier 3") registrants, notices are distributed to private residences, businesses, school and community organizations in the area(s) where the offender lives and works. For moderate risk ("Tier 2") registrants, notices are provided to schools and community organizations in those areas. Notification concerning low risk ("Tier 1") offenders is provided only to local law enforcement.

In 2001, New Jersey enacted the Internet Registry Act. N. J. Stat. Ann. 2C:7-12 *et seq.* Under this new statute, Tier 3 offenders and certain Tier 2 offenders have identifying information about them placed on the web site that is available to the general public. Currently, notification is disseminated pursuant to both the original notification procedure and the recently established Internet registry web site.

All registrants are assessed by a county prosecutor to determine their risk of reoffense. In making that determination, the prosecutor utilizes New Jersey's Risk Assessment Scale ("RAS"). (Buncher Dec. Ex. A.) The RAS is a matrix of thirteen static and variable risk factors which are weighted according to their relative predictive

value.[8] The thirteen factors in the RAS are evaluated and assigned a point score by the prosecutor. The combined point total from all the RAS factors determines the registrant's tier classification.

Most of the RAS categories can be scored based upon a review of the registrant's criminal history and treatment records. For a few of the factors – primarily the "Community Support" factors at the bottom of the scale – the prosecutor will often rely upon information obtained from the registrant at the time of his last registration. With this information available, an attorney or paralegal who is familiar with the RAS can calculate a registrant's point total

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[8]Actuarial risk assessment tools are frequently relied upon to help quantify the risk presented by a particular sex offender. Two actuarial scales commonly used throughout the United States and Canada are the Static-99 and the MnSOST-R. In a number of decisions arising from Megan's Law matters and civil commitment proceedings, courts have approved the use of actuarial instruments as part of an individualized risk assessment. *See, e.g., In re Registrant C.A.*, 147 N.J. 71, 105 (1996) ("the State has produced sufficient evidence to convince us that the factors used in the [actuarial] Scale are reliable predictors of recidivism and are weighted according to their relative effectiveness as predictors";) *In re the Commitment of R.S.*, 339 N.J. Super. 507, 545 (App. Div. 2001) ("actuarial instruments are an accepted and advancing method of helping to assess risk of recidivism among sex offenders",) *aff'd*, 173 N.J. 134 (2002); *Commonwealth v. Rodriguez*, 2001 WL 303058 (Mass. Super. 2001) ("Statistical risk prediction scales, developed from regression analysis and using multiple variables that have been shown to be correlated with sexual recidivism, have substantially greater predictive validity than clinical judgment."); *In re Detention of Strauss*, 20 P.3d 1022, 1025 (Wa. Ct. App. 2001) ("Scientific literature and secondary legal authority also supports the view that the relevant scientific community generally accepts the three actuarial instruments in question as part of overall risk assessment."), *review granted, In re Detention of Thorell*, 45 P.3d 534 (Wa. 2002).

and resulting tier classification in just a few minutes.

The widespread use of the RAS in New Jersey has streamlined the risk assessment process and resulted in greater uniformity throughout the State.

As originally enacted, Megan's Law did not provide registrants any opportunity to challenge the tier classification or community notification proposed by the prosecutor. However, in *Doe v. Poritz*, 142 N.J. 1 (1995), the New Jersey Supreme Court held that due process requires that registrants who are deemed subject to either Tier 3 or Tier 2 notification be afforded the opportunity for judicial review of the prosecutor's determination.

Under the procedures in place since *Doe v. Poritz*, a registrant classified as Tier 3 or Tier 2 is served with a notice which advises him of his proposed classification and his right to judicial review. The notice includes a court date on which his matter will be heard and advises him of his opportunity to apply for a court-appointed attorney. (Buncher Dec. ¶ 11.)

Many registrants do not exercise their right to judicial review. According to a June 2001 report issued by New Jersey's Administrative Office of the Courts ("AOC Report"), 37% of the registrants who had the opportunity for judicial review defaulted. (Buncher Dec. Ex. B at 16.)

For the registrants who do pursue a challenge, they, or their attorneys, are provided with copies of the papers relied on by the State to support the proposed tier classification. These papers will include the RAS completed by the prosecutor's office. (Buncher Dec. ¶ 13.)

Prior to or at the initial conference, the registrant will advise the court and the prosecutor of the bases for his objections to the proposed classification. These objections will typically focus on particular categories of the RAS. According to the AOC Report, "for the most part registrants objected to only one or two factors" on the RAS. (Buncher Dec. Ex. B at 22.)

In most New Jersey counties, there is a single judge designated to hear Megan's Law tier classification matters. Typically, that judge will set aside a few hours one day each month for Megan's Law hearings.

Many cases are resolved, either through a settlement or a hearing, at the initial conference. However, for good cause, the court may grant a short adjournment and set a new date for the hearing. (Buncher Dec. ¶ 16.)

Most cases settle. In many instances, a registrant is able to bring to the attention of the prosecutor new information that supports a finding of a reduced level of risk. For example, the registrant may be able to show that he is doing well in sex offender treatment, is steadily employed, or is complying with the requirements of Community Supervision for Life (New Jersey's parole-like supervision of convicted sex offenders). In other instances, a settlement is reached based upon a showing that the registrant's case is of a type which has been recognized as not requiring community notification, such as where the registrant is an incest offender and there is no indication he is a threat to the community-at-large. In some instances, after evaluating the discovery, counsel for the registrant will concede there are no grounds for challenging the State's tier classification. (Buncher Dec. ¶ 17.)

For the cases that do not settle, the attorneys for the registrant will work with him to obtain information relevant to his case. In a small percentage of cases, this will include having the registrant evaluated by an expert psychologist who will render an opinion concerning the degree and nature of risk presented by the registrant. In New Jersey, an expert report may be submitted only with the permission of the court, based upon a showing that the RAS fails to adequately take into account significant aspects of the registrant's character or prior offense. *In re Registrant G.B.*, 147 N.J. 62, 87 (1996). The State will typically have the option of obtaining its own expert, but this rarely occurs. The experts retained in these matters are generally viewed as credible, and few cases degenerate into a "battle of the experts." (Buncher Dec. ¶ 18.)

For the few cases that proceed to a hearing, the hearing is usually quite brief. These matters are generally heard "on the papers," without any live witnesses, and are usually concluded in well under an hour. Generally, the court will render an oral decision on the record at the conclusion of the hearing. Appeals from the trial court's ruling are relatively rare, and most appeals are concluded quite quickly – usually within two or three weeks of the trial court's ruling. New Jersey's intermediate-level appellate court generally does not accept briefs in these cases, conducts the oral arguments by telephone, and usually issues an order deciding the appeal the same day the case is argued. (Buncher Dec. ¶¶ 19-20.)

The procedures just described have been used to process thousands of cases in New Jersey. As of March 1, 2001, 5,720 New Jersey registrants had been assigned tiers. Of that group, 3,332 registrants were classified by the

prosecutor as either Tier 3 or Tier 2. Of these registrants, 2,686 had been notified of their classification and the opportunity for judicial review. (Buncher Dec. Ex. B at 14.) 1,569 cases were resolved after a conference or hearing. (Buncher Dec. Ex. B at 17.)

For approximately one out of every three New Jersey sex offenders evaluated by the State, the State concludes at the outset, (*i.e.*, before any challenge is filed by the registrant), that there is a low risk that the registrant will reoffend. (Buncher Dec. ¶ 22.) Based on that finding, the State does not seek any community notification for these registrants. No notice or hearing is required in such cases. (Buncher Dec. ¶ 22.)

Other jurisdictions have adopted a number of different approaches to risk classification and attending due process procedures. Like New Jersey, Minnesota uses a three-tier classification system. (Gallo Dec. ¶ 3.) However, the classification is typically performed by an administrative body – the "End of Confinement Review Committee" – which utilizes the MnSOST-R actuarial scale to arrive at a presumptive risk classification. (Gallo Dec. ¶¶ 4-5.) The registrant is given the opportunity to appear before that body and present evidence, and may appeal any adverse decision to an administrative law judge. (Gallo Dec. ¶¶ 5, 12.) In Massachusetts, a risk classification hearing is conducted before an administrative body, and any appeals from those decisions are filed in state court. (Donovan Aff. ¶ 9.) In New York, an administrative board, using a risk assessment instrument, makes an initial risk classification recommendation, and the registrant is then entitled to a judicial hearing concerning the classification. (Johnson Dec. ¶¶ 5, 8.)

Thus, a considerable range of options are available in terms of the procedures by which sex offender assessments may be efficiently performed and reviewed. Judges, administrative bodies and attorneys throughout the United States have become expert in rationally classifying offenders according to their relative likelihood of reoffense. When appropriately performed, these assessments are founded upon consideration of risk factors whose predictive validity has been tested and established, and provide important information to the court that may be relevant to the case.

C. Notice and Hearing Requirements Provide an Essential Safeguard.

It is essential that offenders be provided the opportunity to object to a proposed risk classification and present evidence in their favor. In many instances, because of the availability of a due process hearing, registrants have been able to show that clear errors were made in their cases which impacted on the ultimate decision of whether, or to what extent, community notification should be disseminated.

Perhaps the most dramatic examples of this are the cases where it was shown that the client was not even subject to the community notification statute. The question of whether a given offender has committed a "sex offense" under the statute can be complicated, particularly in cases where the underlying offense is from another jurisdiction. In a number of cases, counsel for registrants have successfully shown that an error was made in classifying the offender as a Megan's Law registrant. (Buncher Dec. ¶ 26, "In at least sixteen cases, [the New Jersey Public Defender's] Office has successfully shown that an error was made in classifying the offender as a Megan's Law registrant."); (Gallo Dec. ¶ 7,

explaining that in Minnesota, there are 3-5 cases per year where it is established that the notification statute was mistakenly applied to the offender); (Donovan Aff. ¶ 20, citing two cases in Massachusetts in which the offender was relieved of the obligation to register); (Lane Dec. ¶ 6, "In a small number of cases [in Ohio], it has been demonstrated that the client is not even subject to the statute."). As a result, these persons were relieved of any obligation to register and were exempted from community notification.[9]

More commonly, due process review results in a change in the registrant's tier classification and/or a modification of the proposed notification. In New Jersey, for example, registrants frequently prevail in their challenges to the tier classification proposed by the prosecutor – of the 1,569 total cases disposed of following a conference or hearing, in 436 cases (28%), the initial tier 2 or tier 3 designation was changed by the court. (Buncher Dec. Ex. B at 16). Similar rates of success can be seen in some of the other states that adopted due process procedures. (Donovan Aff. ¶ 20, "In 27% of cases tried before the SORB, pre-hearing risk level determinations by the board were reduced"); (Gallo Dec. ¶ 8, "In about 15% of all cases, the incorrect [actuarial] score results in a registrant's score falling into a different presumptive level of risk.").

In many cases, counsel is able to establish that the offender presents a low risk, and therefore should not be subject to community notification. These cases include a

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[9]These cases belie petitioners' claim (Pet. Br. at 38) that the relief afforded to the plaintiffs in this matter will have no impact on the "plus" factor identified by the court of appeals (*i.e.*, the registration requirements).

wide variety of issues, such as errors in numerical calculations on an actuarial scale, inadvertent failure of the state to follow its own guidelines, or a failure to obtain or consider relevant information bearing upon the registrant's risk (*e.g.*, records establishing recent employment or treatment). The following are just a few representative examples.

In the matter of D.M., the registrant was able to establish from information contained in the discovery that the underlying offense was intra-familial, and therefore of a low risk nature. D.M. also provided evidence that he had a good record of employment and residential supervision. In light of this new information, D.M. was deemed a low risk, and not subject to community notification. (Buncher Dec. ¶ 32.)

Registrant D.D. was an 18 year-old Central American high school student studying in New Jersey. D.D. had a consensual sexual relationship with a 15 year-old girl who attended the same school. The prosecutor scored the RAS incorrectly, basing her determination on records of another individual with the same name. When this error was brought to the prosecutor's attention, the state decided not to seek community notification. (Buncher Dec. ¶ 29.)

In Massachusetts, "evidentiary hearings serve the critical function of distinguishing offenders more likely to reoffend from those less likely or not at all likely to reoffend." (Donovan Aff. ¶ 13.) They have seen cases where the Sex Offender Registry Board mistakenly believed that the offender had been convicted of raping a child, or overlooked a prior evaluation of the offender which concluded that he presented a low risk of reoffense.

(Donovan Aff. ¶ 18.) Without the opportunity for review, these offenders would have been subjected to unnecessary notification.

In New York, the classification board assessed points against an offender based on his "refusal" to participate in therapy. Counsel for the registrant was able to show that no sex offender treatment programs were offered in the institutions where the registrant was incarcerated, and the tier classification was lowered. (Johnson Dec. ¶ 7.) In another case, counsel established that registrant was not in denial, and had taken responsibility for his offense while in treatment. (Johnson Dec. ¶ 9.)[10]

In addition to ensuring that tier determinations are based upon a fair assessment of complete and accurate information, the availability of a due process hearing has resulted in a more nuanced understanding of sex offender risk assessment. As noted above, in a number of decisions, courts have identified types of offenses or offenders for whom community notification may not be appropriate. *See cases cited in section I.A., supra.*

The foregoing illustrates that providing registrants with a meaningful opportunity to participate in the risk assessment process helps to ensure that the ultimate determination is rational, and based on an accurate and complete assessment of the facts. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("the two central concerns of procedural due process [are] the prevention of unjustified or

[10]The declaration submitted by New York counsel also cites a number of examples of cases in which the opportunity for judicial review worked to the state's advantage. (Johnson Dec. ¶ 11.)

mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process"); *Carey v. Piphus*, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.").

CONCLUSION

Based upon the foregoing, *amicus curiae* respectfully requests that the judgment of the court of appeals be affirmed.

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BRIEF OF AMICUS CURIAE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Association for the Treatment of Sexual Abusers (ATSA) is a non-profit international organization of professionals specializing in research into sexual abuse and in the treatment, assessment and supervision of sexual abusers. ATSA has more than 2000 members, drawn from all fifty states and nine foreign countries. Its membership includes the most prominent clinicians and researchers in the field. ATSA

has previously submitted briefs as *amicus curiae* in support of the State of Kansas in *Kansas v. Crane*, 534 U.S. 407 (2002), and *Kansas v. Hendricks*, 521 U.S. 346 (1997), both cases, like this one, involving the assessment and treatment of sexual abusers.

ATSA's Code of Ethics and Practice Standards comprise an internationally recognized guide for the evaluation and treatment of sex offenders. *See, e.g., Turay v. Seling*, 108 F.Supp. 2d 1148, 1155 (W.D. Wash. 2000) (citing ATSA Code as applicable professional standard). ATSA's guiding principles are:

- Community safety takes precedence over other considerations and ultimately over the interest of sexual abusers and their families.
- Inadequate or unethical treatment damages the credibility of all treatment and presents an unnecessary risk to the community.
- Although many, if not most sexual abusers are treatable, there is no known cure. Management of sexually abusive behavior is a life-long task for some sexual abusers.
- Many sexual abusers will not comply with treatment or supervision requiring external motivation. Internal motivation improves the prognosis for completing a treatment program, but in and of itself, may not be sufficient to ensure compliance in treatment engagement.
- Criminal investigation, prosecution and a court order requiring specialized treatment are important components of effective intervention and management.
- It is imprudent to release untreated sexual abusers into the community without specialized evaluation, treatment, and/or supervision.
- Providers should work cooperatively with others involved in the prevention of sex offenses, such as probation/parole officers, child abuse clients' support persons, and therapists who work with victims.

ATSA promotes the effective treatment and supervision of sexual abusers who have been released from custody. ATSA also strives to clarify common misunderstandings about sexual abusers, and to increase public awareness of the benefits of modern approaches to treating them. "Undifferentiated" notification requirements, such as that authorized by the Connecticut Sex Offenders' Registration Law, *see Doe v. Lee*, 132 F.Supp.2d 57, 61 (D.Conn. 2001) , may, in ATSA's judgment, do more harm than good. Instead, community notification can and should be limited to individual sexual abusers who are determined to be most likely to sexually re-offend. *See* ATSA, Community Notification Position Statement (1996), *available at* http://www.atsa.com/ppnotify.html.[1]

STATEMENT

Connecticut's Sex Offender Registration Law (SORL) establishes a mechanism to monitor convicted sex offenders who have been released from prison, probation, or parole through a combination of governmental and private action.[2] The SORL requires persons convicted of sex offenses in Connecticut, and persons convicted elsewhere but residing in or visiting Connecticut, to register by "name, identifying

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. Letters from the parties consenting to submission of this brief have been filed with the Clerk. Sup. Ct. R. 37.3.

[2] The SORL applies to persons found not guilty by reason of mental disease or defect as well as those found guilty. We follow the petitioner in referring to registrants as "convicted" for purposes of this brief. *See* Brief for Petitioners at 5 & n.6 (hereinafter "Pet. Br. at __").

factors, criminal history record, and residence address." Conn. Gen. Stat. §§ 54-251(a), 54-252(a), 54-253 (a) & (b), 54-254(a) (2002). Persons convicted of a sexually violent offense must also provide "documentation of any treatment received for mental abnormality or personality disorder." Conn. Gen. Stat. § 54-252(a) (2002). The Commissioner of Public Safety maintains a registry of the information submitted by convicted sex offenders, periodically verifies home addresses, and takes photographs of registered sex offenders at least once every five years. Conn. Gen. Stat. § 54-257 (2002). Registry information is made available to local law enforcement agencies and to the Federal Bureau of Investigation. The sex offender registry aids law enforcement agencies in the detection and prevention of sex offenses by registrants.[3]

In addition to providing information to law enforcement agencies, SORL also calls for the distribution of information about convicted sex offenders to private citizens. SORL directs the Department of Public Safety to publish registration information over the Internet. Conn. Gen. Stat. § 54-258(a) (2002). Before the district court enjoined its operation, Connecticut's Sex Offender website published a registry containing the ordinarily private home addresses, mental health treatment information, and photographs obtained through compulsory registration, as well as matters of public record derived from court proceedings. SORL also deems the private information provided by registrants a public record. *Id.*[4]

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[3] In addition to allowing the police to monitor the activities of registered sex offenders, the SORL also requires registrants to provide fingerprints and DNA samples, which may aid the police in identifying the person responsible for an unsolved crime. *Doe v. Dep't of Public Safety*, 271 F.3d 38, 43 (2d Cir. 2001) .

[4] This statutory *ipse dixit* does not change the fact that, but for the felony penalties compelling sex offenders to register and to provide information to the Department of Public Safety, the information provided would ordinarily remain private.

Public notification is intended to advance the governmental interest in public safety by warning members of the public who may encounter a registered sex offender in the work place or in their neighborhoods.[5] Viewers of the Sex Offender website established pursuant to the SORL may search the registry by name or by location, enabling members of the public to identify the convicted sex offenders with whom they are most likely to have contact. *See Doe v. Lee,* 132 F.Supp.2d at 61. Before the district court enjoined its operation, the website included the following "disclaimer":

> This information is made available for the purpose of complying with Conn. Gen. Stat. § 54-250 *et seq*... The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sex offenses. The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this [sic] data on the Internet is to make the information more

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[5] At present, there is little evidence that notification actually prevents recidivism by sex offenders. Although they found that sex offenders were arrested more quickly for new offenses after community notification, researchers found no appreciable reduction in re-offense rates after notification. *See* Donna Schram & Cheryl D. Milloy, Community Notification: A Study of Offender Characteristics and Recidivism (1995). A more recent study of sex offenders in Iowa reached a similar conclusion. *See* Geneva Adkins, *et al.*, The Iowa Sex Offender Registry and Recidivism (2000), *available at* http://www.state.ia.us/government/dhr/cjjp/pdfs/SexOffenderReport.pdf.

> easily available and accessible, not to warn about any specific individual. Anyone who uses this information to injure, harass, or commit a crime against any person included in the registry or any other person is subject to criminal prosecution.

Doe v. Dep't of Public Safety, 271 F.3d at 44-45.

SORL recognizes that disclosure of registry information and, in particular Internet publication of the registry, may cause harm not posed by the existence of public records of a conviction. For this reason, SORL allows a narrow category of convicted sex offenders to petition to restrict the public dissemination of registration information, even though information about a prior conviction already exists in the public record. Conn. Gen. Stat. § 54-255 (2002).[6] For example, notwithstanding the existence of

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[6] The Second Circuit explained:

> Certain people who would otherwise fall within the scope of the law are eligible for relief from these provisions. Two narrow categories of offenders need not register at all if a court so orders upon a finding that "registration is not required for public safety": anyone who was convicted of engaging, while under nineteen years of age, in sexual intercourse with a victim who was between thirteen and sixteen years old but at least two years younger than the perpetrator; and anyone who was convicted of subjecting another person to sexual contact without the victim's consent. *See* Conn. Gen. Stat. § 54-251(b) , (c).
>
> A court has discretion to order the DPS [Department of Public Safety] to restrict public dissemination of information about two other classes of registrants -- those who were convicted either of sexual assault in a spousal or cohabiting relationship or of any crime involving a victim under the age of 18 to whom the offender is related -- if the court finds that publication is not required for public safety and would reveal the

public court records, subsection 54-255(a) authorizes the court to deny public access to registration information for persons convicted of fourth degree sexual abuse, if "the court finds that dissemination of the registration information is not required for public safety and that publication of the registration information would be likely to reveal the identity of the victim within the community where the victim resides." Conn. Gen. Stat. § 54-255(a) (2002). The SORL does not provide a similar procedure, however, to limit access to registry information when disclosure would only harm the registrant or innocent members of the registrant's family, even when dissemination of the registration information is not required for public safety.

The district court held that the SORL's failure to allow an individual to contest the appropriateness of notification violated the due process clause of the Fourteenth Amendment. *Doe v. Lee,* 132 F.Supp.2d 57, 66 (D. Conn. 2001). The Court of Appeals affirmed. *Doe v. Dep't of Public Safety,* 271 F.3d 38, 62 (2d Cir. 2001).

> identity of the victim. *See id.,* § 54-255 (a), (b). A registrant who has committed one of several specified offenses between October 1, 1988 and June 30, 1999 may petition the court for an order limiting the dissemination of his or her registration information to law enforcement purposes, provided that the court finds that such a limitation would not threaten public safety. *See id.* § 54-255(c). This right of petition is also afforded to a person who had been convicted between October 1, 1988 and September 30, 1998 of a crime within the purview of the sex offender law provided that he or she did not serve jail time for the original conviction, has not subsequently been convicted of another crime covered by the law, and has registered with the DPS.

Doe v. Dep't of Public Safety, 271 F.3d at 45. *See also Doe v. Lee,* 132 F.Supp.2d at 61 & nn. 12, 13.

SUMMARY OF THE ARGUMENT

Community notification should be limited to individual sex offenders who have been determined, through the use of reliable and professionally accepted risk assessment techniques, to be likely to commit new sexual offenses. Many states rely on risk assessments to determine the scope of community notification. The indiscriminate publication of information concerning all convicted sex offenders, as provided in the SORL, inflicts harm on many convicted offenders who do not present a significant risk of recidivism, without enhancing public safety.

Because the registry provides only limited information from which to form judgments about a registrant's potential dangerousness, the result of the SORL's notification requirements is that members of the public are unable to distinguish non-dangerous sex offenders from highly dangerous offenders. This surfeit of information disserves the public safety rationale for publication, by reducing the caution that would be exercised with regard to the most dangerous sexual abusers on the basis of more targeted notification. Unnecessarily broad publication may also harm innocent members of the offender's family, who are affected by the loss of employment and housing opportunities and community hostility. Finally, the SORL may create disincentives for convicted sex offenders to seek and maintain treatment, and may interfere with their successful reintegration, thereby increasing the risk of sexual re-offending.

ARGUMENT

NOTIFICATION SHOULD BE LIMITED TO HIGH RISK PREDATORY SEX OFFENDERS.

The notification requirements of the SORL, and other state laws like it, are aimed at enhancing public safety by

giving ordinary citizens the ability to protect themselves and their families from people who may live or work in the community and who are predisposed to commit sexual offenses. *See E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997) (describing background of New Jersey's original Megan's Law). This rationale for notification is inapplicable to a convicted sex offender who is not likely to re-offend and whose community reintegration, risk management and personal safety could be needlessly jeopardized by publication of registry information over the Internet. It is also inapplicable to other categories of sex offenders who do not pose a threat to the wider community served by Internet notification. *See id.* at 1085 (notification under New Jersey law is appropriately tailored to the risk presented by the offender, for example, sex offenders who have only victimized members of their own household may not pose a threat to the community at large). Connecticut's SORL nevertheless provides for the undifferentiated publication of information concerning all convicted sex offenders within its purview, denying any person who has been convicted of an eligible offense the opportunity to contest notification and to avoid its stigmatizing consequences.

Citizens are aware that the legislature does not require most people to register their addresses with the police and be photographed for publication over the Internet.[7] The ordinary viewer of the Sex Offender website is therefore likely to conclude that although the Department of Public Safety has made no determination as to the dangerousness of any particular individual, the state legislature has done so with respect to the group as a whole. *See Doe v. Lee*, 132 F. Supp.2d at 63 ("[T]he undifferentiated nature of the registry

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[7] The United States draws an apt analogy between sex offender registries and wanted posters in its *amicus curiae* brief in *Godfrey v. Doe* (No. 01-729) at 19. The form and content of the Connecticut Sex Offender website resembles that of wanted posters and conveys the same unmistakable warning that the person depicted is a menace to the community.

and the undisputed purposes of the CT-SORA make it reasonable for a viewer of the registry to conclude that any particular registrant is dangerous."). Indeed, the ordinary person consulting the Sex Offender website is likely to share the Solicitor General's view that all "[s]ex offenders pose a unique public threat," Brief for the United States as Amicus Curiae Supporting Petitioners at 9 (hereinafter "U.S. Br. at __"), rather than distinguishing between those who present a significant threat and those who do not. The website admonishes viewers against using the information to "injure, harass, or commit a criminal act against" a registrant, but it does not discourage viewers from refusing employment and housing to a registered sex offender or from ostracizing a registrant and his family. Indeed, the public safety rationale for the SORL presumes that – armed with the registry information – individual citizens will protect themselves and their families from sex offenders by avoiding or limiting contact with them.

Congress did not require states to publish registration information about all convicted sex offenders as a condition for full federal funding, as Connecticut has done. The Wetterling Act, as amended, requires participating states to "release relevant information to protect the public *concerning a specific person required to register*." 42 U.S.C. § 14071(e)(2) (2002) (emphasis added). That language implies that whether and how much information is made public, and to whom, should depend upon the individual, and should not be the same for all persons subject to registration.

The Department of Justice ("DOJ") guidelines implementing the notification provisions of the Wetterling Act likewise envision that states will retain and exercise "discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes." 64 Fed. Reg. 571, 582 (Jan. 5, 1999). The DOJ guidelines describe three permissible approaches: (1) the particularized risk assessment of individual offenders, with

notification requirements tied to the degree of risk; (2) limiting notification to offenders based on certain characteristics or offense categories; and (3) providing information to the public on request. *Id.* States that opt to provide information on request, as Connecticut did in the SORL, "may make judgments about which registered offenders or classes of registered offenders should be covered and what information will be disclosed concerning those offenders." *Id.* In short, there is nothing in the federal law that requires or even encourages states to treat all sex offenders alike for purposes of notification.

Many states, unlike Connecticut, have chosen to tailor notification requirements to the degree of risk posed by individual sex offenders or categories of sex offenders.[8] For example, Arizona requires prompt risk assessments for all newly released sex offenders and limits its sex offender website to higher risk level two and three offenders. Ariz. Rev. Stat. §§ 13-3825, 13-3827 (2002). Connecticut, by contrast, has opted for an extreme approach that avoids any risk assessment. Not only does the SORL require publication of registration information without regard to risk; it also imposes the same obligations on any person convicted of what the state classifies as a "sexually violent offense" that federal law requires for persons determined to be "sexually violent predators." *See* Pet. Br. at 6 n. 8. *See also* Conn. Gen. Stat. § 24-252(a) (2002) (requiring collection of mental health treatment information because Connecticut does not designate sexually violent predators); Brief of Amici Curiae the District of Columbia and Thirty-Five States and

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[8] The United States identifies 22 states, in addition to Connecticut, that it says have adopted a similar categorical scheme for notification (U.S. Br. at n.11). Of those 22 states, Hawaii's law has been invalidated. *See State v. Bani*, 36 P.3d 1255 (Haw. 2000). According to a Justice Department study of notification regimes as of February 2001, however, few states publish registry information concerning all convicted sex offenders, as Connecticut does. *See* Devon Adams, Bureau of Justice Statistics, Summary of State Sex Offender Registries, 2001 at table 4 (March 2002).

Territories in Support of the Petitioners at 12 n.8 (representing that the Justice Department waived this requirement). In effect, Connecticut has thrown up its hands and decided that because it will not make judgments about the risk that individual sex offenders may present, its citizens should be warned about dangerous and non-dangerous convicted sex offenders alike.

Proponents of indiscriminate notification rely on two myths. First, they claim that all sex offenders are so likely to commit new offenses that community notification is appropriate without exception. Second, they argue that techniques for predicting the future dangerousness of sex offenders are too unreliable to be used to differentiate offenders on the basis of risk. Both propositions are contradicted by empirical evidence and experience.

1. Not All Sex Offenders Are Likely to Re-Offend.

Popular and political mythology lumps all sex offenders together. Consistent with that view, the United States argues as *amicus* that Connecticut's SORL is constitutional because it is reasonable for the state to treat all sex offenders as dangerous, even if some are not. *See* U.S. Br. at 25. The reality is that there are many distinct categories of sex offenders, with different motivations and different prognoses. *See* W.L. Marshall & Howard E. Barbaree, Outcomes of Comprehensive Cognitive-Behavioral Treatment Programs, Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender, 363-385 (W.L. Marshall, et al., eds. 1990). Indeed, in this case, Connecticut did "not dispute that within the group of persons required to register as sex offenders there is significant variation in the likelihood of particular offenders committing another 'sex offense.' " *Doe v. Lee,* 132 F.Supp. 2d at 64. Recidivism rates for incestuous offenders, for example, are quite low. *See* R. Karl Hanson & Monique T. Bussiere, Predictors of Sexual Offense Recidivism: A Meta-Analysis (User Report 1996-04) (Public

Works and Government Services Canada 1996) (4% recidivism rate for incest offenders); R. Karl Hanson, et al, Long Term Recidivism of Child Molesters, 61 J. Consulting & Clin. Psychology 646, 649 (1993); L. Motiuk & S. Brown, Factors Related to Recidivism Among Released Federal Sex Offenders, presented at the XXVI Int'l Cong. Of Psychology (1996). Recidivism rates for certain types of sex offenders also diminish significantly with age. *See* R. Karl Hanson, Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters. (User Report No. 2001-01), *available at* http://www.sgc.gc.ca/Epub/ Corr/ eAge 200101/ eAge 200101.htm; R. Karl Hanson, Recidivism and Age: Follow-Up Data From 4,673 Sexual Offenders, __ J. of Interpersonal Violence __ (forthcoming 2002).

The misconception that *all* sex offenders are highly likely to commit new sex offenses is based on recidivism rates reported in studies of particular high-risk categories of sex offenders, not the full range of offenders covered by the Connecticut SORL. One study relied on by *amici* National Governors Association, *et al.*, estimated a 52% rate of sex offense recidivism for a narrower class of predatory pedophiles, using a predicted cumulative "failure rate" over 25 years.[2] By comparison, another recent study found a recidivism rate for a sample of child molesters that included incestuous offenders of 12.7% over a five-year period. R. Karl Hanson & Monique T. Bussiere, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, 66 J. of Consulting & Clin. Psych. 348 (1998). Most sex offenses against children are committed, not by strangers, but by family members and others the child knows and trusts. *See* Bureau of Justice Statistics, Sexual Assault of Young

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[2] *See* Robert A. Prentky, *et al.,* Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis, 21 L. & Hum. Beh. 635, 644 (1997). The actual observed recidivism rate was 32% (37/115 child molesters were charged with new sex offenses following release; of these 29 were convicted and 26 were imprisoned for the new sex offenses).

Children as Reported to Law Enforcement: Victim, Incident and Offender Characteristics (2000). Studies focused on predatory pedophiles magnify the danger presented by released sex offenders in general.[10]

To be sure, recidivism rates calculated on the basis of new convictions can understate the true number of new sex offenses because many sex offenses are not reported or prosecuted. *See* American Psychiatric Association, Dangerous Sex Offenders, 129 (1999). On the other hand, many studies of recidivism focus on sex offenders released from prisons or secure treatment programs, rather than offenders placed on probation. The use of prison and secure treatment program populations in these studies tends to skew the sample towards serious and repeat sex offenders, who generally present the greatest risk of re-offending upon release. Recidivism rates reported in these studies may not be relevant to the entire class of sex offenders covered by laws such as Connecticut's SORL, which includes offenders sentenced to probation.[11]

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[10] "Predatory" refers to an act directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship is established or promoted for the primary purpose of victimization. *Cf.* 64 Fed. Reg. at 583 (similar definition adopted by the Department of Justice).

[11] Even studies of prison and secure treatment populations report recidivism rates that belie the popular misconception that all sex offenders re-offend. *See* California Department of Justice, Effectiveness of Statutory Requirements for the Registration of Sex Offenders (1988) (19.7% of sex offenders released in 1973 were arrested for a new sex offense over 15 year study period); Hanson and Bussiere, 66 J. of Consulting and Clin. Psych. 348 (13.4% aggregate recidivism rate over 4-5 year period after release); Arizona Department of Corrections, Fact Sheet 98-06, *available at* http://www.adc.state.az.us/FACTSHEETS/Fact%20Sheet% 2098-06.htm (reported a 3.7% rate of recidivism for new felony sex offenses among sex offenders released from prison over a ten year period). Overall, 20.8% of the sample returned to prison over the study period.

Older studies may also underestimate the impact of treatment on recidivism. Today, "[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism." *McKune v. Lile*, 536 U.S. ___, 122 S.Ct. 2017, 2024 (2002) (citing U.S. Dept. of Justice, National Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988)); *accord* 536 U.S. at __, 122 S.Ct. at 2043 (Stevens, J., dissenting) (Mental health professionals agree "that treatment programs can reduce the risk of recidivism by sex offenders.") (citing Winn, Strategic and Systematic Management of Denial in Cognitive/Behavioral Treatment of Sex Offenders, 8 Sexual Abuse: J. Research and Treatment 25, 26-27 (1996)).

The recidivism rates cited by advocates of indiscriminate notification do not reflect current policies towards sex offenders. Many of the studies cited involved sex offenders released before the widespread use of new and more effective treatment techniques, and before prison-based treatment programs were common. The belief that sex offender treatment does not work is largely based on a 1989 review that found no evidence that clinical treatment reduces rates of sex offenses.[12] That review did not in fact conclude that sex offender treatment is futile, as commonly believed, but rather that methodological weaknesses in then-existing studies of sex offender treatment precluded finding a statistically significant treatment effect. A more recent statistical analysis of 43 studies found a significant reduction in recidivism among treated sex offenders. Offenders treated using modern cognitive-behavioral techniques re-offended at a 10% rate over a 46 month study period, compared with a

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[12] Furby, *et al.*, Sex offender Recidivism: A Review 105 Psych. Bull. 3 (1989).

17% rate for untreated offenders.[13] Similarly, historical data on recidivism do not reflect the impact of longer prison sentences and civil commitments of the most dangerous sex offenders. In short, it is wrong to extrapolate from studies of sub-populations of sex offenders to generalizations about all sex offenders.

The argument that high recidivism rates for a broad class of offenders justifies restrictions on liberty without affording individual due process also cannot be limited to sex offenders. Sex offenders are not uniquely prone to re-offend, or to commit serious offenses after release. For example, although rapists are statistically more likely to commit rape after release than other felons, they had a *lower* rate of re-arrest for violent felonies overall than most other categories of offenders convicted of crimes of violence. *See* Lawrence A. Greenfield, Bureau of Justice Statistics, Sex Offenses and Offenders vi, 25-26 (1997); Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, Recidivism of Prisoners

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[13] R. Karl Hanson, et al., First Report of the Collaborative Outcome Data Project on the Effectiveness of Treatment for Sex Offenders, 14 Sexual Abuse: A Journal of Research & Treatment 169 (2002). Other recent research also suggests that treatment may be effective for high risk offenders. *See* J.K. Marques, et al., Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism, 21 Crim. Just. & Behavior 28 (1994); W.L. Marshall & W.D. Pithers, A Reconsideration of Treatment Outcomes with Sex Offenders, 21 Crim. Just. & Behavior 10 (1994); J.V. Becker & J.A. Hunter, Jr., Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse, 19 Crim. Just. & Behavior 74 (1992); G. Hall, Sex Offender Recidivism Revisited: A Meta-analysis of Recent Treatment Studies, 63 J. Consulting & Clin. Psych. 802 (1995). *See also* Oregon Department of Corrections, Outcome Evaluation of the Jackson County Sex Offender Supervision and Treatment Program (June 1997) *available at* http:// www.doc.state.or.us/research /jackrpt2.pdf) (reduction of recidivism in study of community supervision); M.S. Black, E. Parks, P. Konicek, Ohio Dept. of Rehabilitation and Corrections, Ten-Year Recidivism Follow-up of 1989 Sex Offender Releases (April 2001), *available at* http://www.drc.state.oh.us/web/Reports/ Ten_Year_Recidivism.pdf) (showing reduction in recidivism by sex offenders who participated in prison treatment program).

Released in 1994, 9, table 10 (2002) (re-arrest rate for all violent felons for a new violent felony was 27.5%, for rapists the re-arrest rate for all violent felonies was 18.6%, and for rape 2.5%). To accept the contention that states can deprive former offenders of their liberty based solely on aggregate recidivism statistics would mean that similar regulatory schemes could be imposed on many other classes of offenders with high recidivism rates, regardless of the risk presented by an individual.

2. Risk Assessment Can Identify Dangerous Sex Offenders.

It is unnecessary and inappropriate to base notification standards on generalizations about all sex offenders, as Connecticut does. In recent years, researchers have developed actuarial risk assessment instruments. Through studies identifying risk factors that are correlated with sexual recidivism, researchers have shown that it is possible to identify a subset of sexual offenders at highest risk for sex offense recidivism. Empirical research has shown that it is possible to distinguish sex offenders who are most likely to commit new sex offenses from those who are unlikely to re-offend. *See, e.g.* W.L. Marshall & Howard E. Barbaree, Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders, 28 Crim. Just. & Behavior 490 (2001).[14] Yet Connecticut denies a convicted sex offender any process by which to demonstrate that he is

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[14] Other important studies include: Epperson, et al., Minnesota Sex Offender Screening Tool-Revised (MnSost-R): Development, Performance and Recommended Risk Level Cut Scores (1999), *available at* http://psych-serve.iastate.edu/faculty/epperson/MnSost-R.htm; R. Karl Hanson & D. Thornton, Department of the Solicitor General of Canada, Static 99: Improving actuarial risk assessments for sex offenders (User report 1999-2002); R. Karl Hanson & D. Thornton, Improving risk assessments for sex offenders: A comparison of three actuarial scales, 24 L. & Hum. Behavior 119 (2000).

not dangerous and should not be subject to Internet publication.[15]

Connecticut defends its refusal to afford any process arguing that risk assessments are inherently unreliable. *See, e.g.,* Pet. Br. at 25. This argument ignores the fact that Connecticut's SORL does provide for judicial determinations that Internet notification is not necessary for public safety in a limited class of cases in which disclosure would harm the victim, and for offenses committed before the effective date of the statute requiring Internet publication. Thus, Connecticut recognizes that its courts are competent to make determinations about whether the level of risk presented by an individual justifies publication of registry information.

The argument that the state should avoid all individual assessment of risk also ignores the pervasive reliance on predictions of future dangerousness to make decisions about criminal offenders, from the decision whether to order detention before trial, to the decision to impose a sentence of imprisonment or probation, to determinations whether to permit release on parole. Similar predictions must also be made in non-criminal proceedings, such as civil commitments, where a court must determine whether a

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[15] The courts below did not impose any particular method of assessing the risk presented by an individual. Different instruments and assessment methods may be most appropriate for different types of sex offenders. Actuarial risk assessments are typically used in conjunction with clinical judgment. "Static" (unchanging) factors measured by most of the actuarial instruments can be combined with "dynamic" data concerning the offender's current state. *See* R. Karl Hanson & Andrew Harris, The Sex Offender Need Assessment Rating (SONAR): A Method for Measuring Change in Risk Levels 2000-1 (1999), *available at* http://www.sgc.gc.ca/ Epub/Corr/e20001b/e2001b.htm. Empirical research can also play a role in helping states to establish classification schemes that appropriately protect the community without needless harm to registrants and their families. Connecticut, however, has declined to limit dissemination of registry information even in the face of the most compelling possible demonstration that an individual is not a danger to the community.

mentally ill person is dangerous to self or others, and child abuse and neglect cases, where the court must assess the risk to a child from remaining in parental custody. Predictions of future dangerousness are neither theoretically nor practically impossible.

Experience in the many states that require risk assessments and use them to determine notification requirements rebuts the contention that risk assessments are inherently unreliable and worthless. For example, New Jersey, the progenitor of Megan's Law, has developed comprehensive guidelines for the assessment of sex offenders to determine the need for and scope of community notification. *See* Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws (March 2000), *available at* http://www.state.nj.us/lps/dcj/megan1.pdf. *See, generally,* R. Karl Hanson, ATSA, Risk Assessment (Jan. 2000).

Indeed, the practical feasibility of identifying those sexual offenders who are most likely to commit new sex offenses is the logical predicate for civil commitment statutes such as the law the Court upheld in *Hendricks,* 521 U.S. at 357-58 . *See* Brief of ATSA as Amicus Curiae in Support of Petitioner, (No. 95-1469) at 8-10. The Court's decision in *Hendricks* also accepted the feasibility of determining that a once-dangerous sex offender is no longer dangerous and is "safe to be at large." *See Hendricks,* 521 U.S. at 363-64. If such a judgment can be made about the return of a violent sexual predator to the community, then surely one can be made about whether Internet publication of a person's home address and other private information is necessary for public safety.

The lower courts did not require Connecticut to adopt any particular process to determine whether a particular registrant's information should be published. They struck the SORL down because it did not allow any process at all. *See Doe v. Dep't of Public Safety,* 271 F.3d at 62; *Doe v. Lee,* 132

F.Supp.2d at 66. The decisions below did not prescribe any particular risk assessment instrument, or indeed any formal risk assessment whatsoever. They did not allocate the burden or set a standard of proof, allowing Connecticut considerable latitude in defining what levels of risk, and what types of risk, would trigger what kind of notification. What they did require is that a convicted sex offender have some opportunity to be heard before being subjected to registration and notification requirements that deny that any possibility of redemption.

It is no answer to say that the state may deny any individual process, even if the class subject to notification under the Connecticut SORL is substantially over-inclusive, because "attempting to assess the particular degree of danger posed by each convicted sex offender before providing community notification would prove 'costly, cumbersome, and inaccurate.'" *See* U.S. Br. at 27. The cost and efficacy of additional procedures are factors to be considered in deciding how much process is due, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), not reasons to deny process altogether. And even imperfect predictors are more accurate than a website that portrays all sex offenders as dangerous without exception. Universal notification means that the state issues warnings about sex offenders that will be inaccurate far more often than not.[16]

3. Indiscriminate Notification May Be Counter-productive.

Indiscriminate notification can contribute to unnecessary vilification of individuals who do not pose a risk to the community, as well as inadvertently escalate

[16] *See* Center for Sex Offender Management, Recidivism of Sex Offenders, 6 (May 2001), *available at* http://www.csom.org./pubs/recidsexof.pdf (for population with low overall base recidivism rate, the best prediction is that no one will re-offend, not that everyone will).

community risk. Indiscriminate notification is harmful to sex offenders whose risk to re-offend is manageable in the community. Notification may result in loss of housing or employment and social stigmatization and condemnation that could impair the offender's ability to successfully function in and contribute to the community. Family members also fall victim to indiscriminate notification, as they must contend with the direct and indirect consequences of such notification, on both the offender and themselves. *See, generally,* Zevitz & Farkas, Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance? 18 Behavioral Science and the Law 375 (2000). Notification and its humiliating and stigmatizing consequences can produce great stress, which may trigger potential risk factors (*e.g.,* the experience of emotions such as rejection, isolation, anger, resentment, fear; along with the corresponding negative cognitions about themselves and others). Stress and instability make it much more difficult for sex offenders to adhere to the regimen called for in cognitive-behavioral treatment. *See* R. Karl Hanson and Andrew Harris, Dynamic Predictors of Sexual Recidivism 1. Indiscriminate community notification makes it extremely difficult for low-risk sex offenders to reintegrate into the community in a stable and effective manner and could potentially trigger risk factors associated with re-offending, diminishing rather than enhancing community safety. *See* Candace Kruttschnitt, *et al.*, Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls, 17 Justice Quarterly 61, 81 (March 2000) (stable employment and treatment found to reduce recidivism).

Indiscriminate notification requirements may also undermine community safety by producing an illusion of security without providing citizens with enough information to assess risk. Viewers of the Connecticut Sex Offender website received similar information about extremely high risk and extremely low risk offenders. That presentation

diminished the value of notification, as compared to a notification scheme limited to higher risk predatory offenders.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, *et al.*,
Petitioners,

v.

JOHN DOE, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

The Public Defender Service for the District of Columbia (PDS) represents clients who will be affected by this case because of the close similarities between the offense-based 1999 D.C. Sex Offender Registration Act ("DC-SORA"), D.C. Code § 22-4001 *et seq.* (2001), and the Connecticut statute under review. PDS clients have successfully challenged the DC-SORA on the same due process grounds presented in this case. *See Doe v. Williams*, 167 F. Supp. 2d 45 (D.D.C. 2001). The government's appeal is stayed pending a decision in this case. PDS recently filed an *amicus* brief in *Godfrey v. Doe*, No. 01-729. The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 to improve the quality of the representation of the accused and to advocate the preservation of constitutional rights in criminal cases. The Connecticut Criminal Defense Lawyers Association ("CCDLA") is NACDL's Connecticut affiliate. Any statute or decision concerning the registration of convicted sex offenders is a matter of great importance to the CCDLA, whose members represent affected criminal defendants in all of the Connecticut trial and appellate courts.

STATEMENT

Connecticut's offense-based Megan's law ("SORL"), like Alaska's similar statute (under review in *Godfrey v. Doe*, No. 01-729), represents a legislative effort to protect the community from released former sex offenders, regardless whether they have been unconditionally discharged from their criminal sentences, by subjecting them to a regime of

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[1] The parties' letters of consent have been filed with the Clerk. No party has authored any part of the brief and no entity external to the *amici* organizations has contributed money toward its preparation.

personal registration and community notification of their "registered sex offender" legal status and personal information, designed to warn the community about registrants' appearance and whereabouts for the duration of their registration period. The Second Circuit's opinion, holding that Connecticut registrants possess a liberty interest in their reputations under circumstances where the State implies that they are sexually dangerous while altering their rights and status under state law through the registration duties, represents the near-unanimous view of federal and state courts that have considered the same due process argument.[2]

Connecticut Law: With narrow exceptions, virtually every person convicted (or found not guilty by reason of mental disease or defect) of an offense of a sexual nature, including a wide array of misdemeanors, must register with police and be subjected to public notification. The types of mandatory and permitted public notification are the same for all registrants. The scheme contains two classes of Registrants, however, for purposes of the type of information that must be revealed to police and the duration of registration and public notification. Ten-year registrants include those convicted of criminal offenses against a minor, nonviolent

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[2] *See Fullmer v. Michigan Dep't of State Police*, 207 F. Supp. 2d 650, 661 (E.D. Mich. 2002); *Doe v. Williams*, 167 F. Supp. 2d 45, 55 (D.D.C. 2001); *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231-32 (M.D. Ala. 1999); *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998); *W.P. v. Poritz*, 931 F. Supp. 1199, 1219 (D.N.J. 1996), *rev'd on other grounds sub nom. E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Hawaii v. Bani*, 36 P.3d 1255, 1266 (Haw. 2001); *People v. David W.*, 733 N.E.2d 206, 211 (N.Y. 2000); *Noble v. Board of Parole*, 964 P.2d 990, 995 (Ore. 1998). *See also Doe v. Attorney General*, 715 N.E.2d 37, 43 (Mass. 1999) (liberty interest in reputation and registration under state constitution); *Doe v. Attorney General*, 686 N.E.2d 1007, 1013 (Mass. 1997) (same); *Doe v. Poritz*, 662 A.2d 367, 419 (N.J. 1995) (federally protected liberty interest in reputation and privacy); *In re C.M.*, 578 N.W.2d 391, 397 (Minn. Ct. App. 1998); *State v. Pierce*, 794 A.2d 1123, 1133 (Conn. App. Ct. 2002).

sexual offenses (Class A misdemeanors codified in Conn. Gen. Stat. §§ 53a-73a) and, in the sentencing judge's discretion, those convicted of a felony committed for a sexual purpose. Life-registrants include those convicted of a sexually violent offense. *Doe v. Dep't of Public Safety*, 271 F.3d 38, 43 (2d Cir. 2001).

Every registrant must, within three days of his or her release into the community, provide the police with a wide range of "identifying factors," including name, photographic image, address, fingerprints, blood sample for DNA analysis, criminal history and any other characteristics "required by the Commissioner of Public Safety." Conn. Gen. Stat. §§ 54-251(a), 54-252 (a), 54-257(c). All registrants must verify their address every 90 days. § 54-257(c), *as amended*, Pub. Act. No. 02-7 § 84 (2002). A person convicted of a sexually violent offense must additionally provide "documentation of any treatment received for mental abnormality or personality disorder." § 54-252(a).

Any registrant who changes his or her residence must report the change to the police within five days. §§ 54-251(a), 54-252 (a), 54-254 (a). Any registrant who regularly travels into or temporarily resides in another state must report his movements to the Connecticut police and abide with the other state's requirements for sex offenders. *Id.* Every registrant must verify his or her address by completing and returning to the State, within ten days of receipt, a nonforwardable verification form. § 54-257(c). Every registrant must submit to photographing upon demand and at least every five years. §§ 54-251 (a), 252-(a), 254(a). Noncompliance is punishable by up to five years in prison. §§ 54-251(d), 252 (d), 253(c), 254 (b).

SORL makes the registry a "public record" that must be "accessible to the public during normal business hours" and mandates its publication "through the Internet." § 54-258(a)(1). Additionally, any other means of notifica-

tion is discretionary with any state agency if it "believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration." § 54-258(2). Prior to the District Court's injunction, registrants were featured on a Department of Public Safety (State Police) website under the caption "Registered Sex Offender," in a display that provided their names, addresses, photographs, and physical descriptions. The website informed the public that "[t]his information is made available for the purpose of protecting the public." 271 F.3d at 45. It also contained a warning against harassing or injuring registrants and a statement that the Department of Public Safety "has not considered or assessed the specific risk of re-offense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual." 271 F.3d at 44-45.

SORL mandates the Office of Adult Probation to "develop a community response education program to be offered to neighborhoods and municipalities" that have been notified that a registered sex offender "will be residing in that community." "The purpose of such program shall be to assist neighborhoods, parents and children to learn how to better protect themselves from sexual abuse and sexual assault." Such programs are not mandated for all communities, but only those where a registrant will reside. § 54-261(a). The educational materials that must be generated relate not only to useful tips of general application, but also to "the enforcement of requirements concerning the registration and

supervision of sexual offenders and the notification of communities where such offenders reside." § 54-261(b).[3]

Federal law: The Wetterling Act, 42 U.S.C. § 14071, conditions states' receipt of full federal funding under 42 U.S.C. § 3756 upon creation of conforming sex offender registration programs. § 14071(g)(2). Nonconforming states lose 10% of such funds. § 14071(f)(2). To conform, states must register persons convicted of "a criminal offense against a victim who is a minor" or "a sexually violent offense." § 14071(a)(1)(A). The Act requires no categorical public dissemination at all—only public dissemination of "relevant information" "necessary to protect the public concerning a specific person." § 14071(e).[4]

SUMMARY OF ARGUMENT

The Second Circuit's meticulously reasoned "stigma plus" analysis is firmly grounded in this Court's decisions involving governmental stigma. *e.g.*, *Siegert v. Gilley*, 500 U.S. 226 (1991); *Paul v. Davis*, 424 U.S. 693 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), and its later cases limiting constitutional torts to those deprivations which are "governmental in nature," *Daniels v. Williams*, 474 U.S. 327, 332 (1986), or inflicted "pursuant to an established state procedure," *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Because this case involves not just governmental stigma, but its systematic infliction through a statutory scheme that imposes on otherwise free American

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[3] The State and all its agents and employees are absolutely immune from all suits potentially arising from publication of the registry. Conn. Gen. Stat. § 54-258 (b).

[4] Petitioner incorrectly asserts, *see* Pet. Br. at 5 n.5, that the Campus Sex Crimes Prevention Act requires States to categorically disseminate information regarding registrants affiliated with institutions of higher education. See PDS *Amicus* Br. in Godfrey v. Doe, No. 01-729, at 4 n.6.

citizens an unprecedented legal duty to register their personal information and interstate travel plans with the State, there can be no question that the injury of which respondent complains states a violation of the Due Process Clause: it is mandated by an established state procedure that alters Registrants' legal rights and status under state law. *Paul*, 424 U.S. at 708. Recognition of a constitutionally protected liberty interest in this case fulfills the core function of the Due Process Clause—"to secure the individual from the arbitrary exercise of the powers of government," *Daniels*, 474 U.S. at 331 (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884))—and in no way implicates this Court's concern about litigants converting the Due Process Clause into a "font of tort law." *Paul*, 424 U.S. at 711.

Perhaps for this reason, the State expends much energy on its claim that publication of the sex offender registry inflicts no injury at all because it makes no potentially false statement about current dangerousness, being only a neutral system of records, hardly distinguishable from registrants' judicial records of conviction. The State's decision to target a subclass of former offenders, based on the legislature's publicly recorded belief that they are uniquely dangerous, to subject them to un unprecedented regime of invasive personal registration and community notification of their degraded legal status of "registered sex offenders," along with their current photographs, detailed physical descriptions and information pinpointing their location at all times, conveys precisely the message that the legislature intends to convey: registered sex offenders are uniquely dangerous, the community is well-advised to avoid them, and, to that end, the State has devised an elaborate scheme for rendering them identifiable and locatable at all times so that the public always knows where this lurking danger resides. Not coincidentally, the United States, in parallel litigation involving Alaska's similar "offense-based" Megan's law, has likened public notification to alerting the public about the "FBI's Ten Most

Wanted Fugitives" or "Ten Most Wanted Terrorists," stating that "[l]aw enforcement's disclosure of names, photographs, charged offenses, and other identifying information *pertaining to persons believed to pose a public safety threat* is a common and time-tested method of promoting public safety." U.S. Brief, *Godfrey v. Doe*, No. 01-729 at 19 (emphasis added). The State's reliance on its so-called website "disclaimer" is unpersuasive because all the disclaimer says is that the state police has made no individualized dangerousness determinations. That does not address the problem that clearly the State legislature believes that registrants are sufficiently dangerous to warrant their inclusion in an Orwellian regime that perpetually keeps them under the watchful eye of the State and encourages their neighbors to do the same. In view of the clear purpose and meaning of Megan's laws and the government's own admissions, Connecticut and its *amici*'s arguments about absence of a defamatory meaning ring hollow.

Because Connecticut registrants satisfy the stigma plus test, due process requires a pre-deprivation hearing regarding the accuracy of the State's message. *Roth*, 408 U.S. at 537 n.12; *Goss*, 419 U.S. at 582; *Constantineau*, 400 U.S. at 437. Since SORL's categorical approach precludes even the possibility of such a hearing, the statute is facially invalid.

More broadly, however, this case is not just about unfair reputation-tarnishing statements uttered by the government, but about an unprecedented regime of *personal* regulation of otherwise free American citizens undertaken not just to limit former offenders' access to certain regulated activities or professions (more easily justified under the State's traditional police powers), but to alter and diminish every aspect of their way of life by forcibly enlisting them in a governmental monitoring and community warning venture designed to make them pariahs in their families, their residences, their workplaces, their communities—and ultimately, in their own minds. The status of "registered sex offender," with its atten-

dant registration obligations and State-sponsored community ostracism, is an invasion and legal alteration of a person's very being of the sort historically reserved for those under criminal sentence in order to incapacitate, deter and punish them. Its application to unconditionally discharged former offenders willy-nilly, without regard to individualized justification based on current dangerousness determinations, cannot be squared with fundamental principles of ordered liberty and must therefore be enjoined.

ARGUMENT

I. SORL VIOLATES THE DUE PROCESS CLAUSE BY PUBLISHING POTENTIALLY FALSE DEFAMATORY STATEMENTS ABOUT REGISTRANTS, WHILE ALTERING THEIR LEGAL STATUS UNDER STATE LAW, WITHOUT ANY PROCESS TO DETERMINE THE ACCURACY OF SUCH STATEMENTS.

A. SORL's invasion of an individual's interest in his or her reputation is cognizable under the Due Process Clause because the deprivation is accomplished through the State's alteration of legal rights and status under state law.

The first element of a due process claim alleging damage to reputation is the allegation that the government has published a stigmatizing or defamatory statement that is false. *Codd v. Velger*, 429 U.S. 624, 627 (1977). The second element is that the state also affect "some more tangible interest such as employment," *Paul*, 424 U.S. at 702, or "alteration of legal status" "as a matter of state law." *Id.* at 708. Once these requirements are met, the plaintiff is entitled to a pre-deprivation hearing regarding the truthfulness of the offending statement. *See, e.g., Roth*, 408 U.S. at 537 n.12 (requiring "name clearing" hearing when person loses government employment and employer charges misconduct); *Goss*, 419 U.S. at 582 (absent immediate threat, students are entitled to

pre-removal hearing on allegation of misconduct); *Constantineau*, 400 U.S. at 437 (requiring hearing before a person may be exposed to "infamy" by a posting implying she is a drunkard; "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential"). The purpose of these hearings is to protect the interest in reputation, although absent the additional "plus" factor, this Court has held that no federally protected liberty interest would exist at all. A hearing is not necessarily required to vindicate the interest invaded by the government action constituting the "plus" factor, depending on the nature of that interest. For example, even if the aggrieved party in a government employment termination situation succeeds in defeating the allegation of misconduct at a "name-clearing hearing," he may still be fired for other reasons, or for no reason at all, if he has no independent property interest in the job. "The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." *Roth*, 408 U.S. at 573 n. 12; *see also Dep't of Public Safety*, 271 F.3d at 59.[5]

These principles summarize what the lower courts have dubbed the "stigma plus" requirements of this Court's strand of due process precedents involving governmental defamation. We agree with the Second Circuit that the pur-

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[5] *Constantineau* assumed that no notice or hearing would be required to support suspension of the right to buy liquor within city limits for one year. It was only the public posting, implying a government-sponsored determination that Mrs. Constantineau was a drunkard, that triggered the need for a pre-deprivation hearing. 400 U.S. at 435. Similarly, even if the State had demonstrated that the students in *Goss* would have incurred the same suspension absent certain allegations of misconduct, the students would still have been entitled to an opportunity to be cleared of such allegations. *See* 419 U.S. at 574-75.

pose of the "plus" in government defamation actions is to sort out those defamatory state actions, not just committed under color of law by a State defendant, but which significantly implicate the government's public role in governing its citizens, here, to the point of altering *legal* rights or status.[6] As the Second Circuit recognized, *Paul*'s so-called "plus" requirement for claims of governmental defamation preceded, presaged and plays the functional equivalent of the Court's later requirements for constitutional torts involving claims of governmental deprivation of property or other interests protected by state law. *See, e.g., Daniels*, 474 U.S. at 330 (state official's negligent act causing injury not a "deprivation in the *constitutional sense*," (quoting *Parratt v. Taylor*, 451 U.S. 527, 548 (1981) (Powell, J., concurring)); *Zinermon v. Burch*, 494 U.S. 113, 141 (1990) (O'Connor, J., dissenting) (Court's jurisprudence regarding constitutional torts "has confirmed [a] distinction between deprivation pursuant to 'an established state procedure' and that pursuant to 'random and unauthorized action'") (citing *Hudson v. Palmer*, 468 U.S. at 532-33; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982)).

Paul's requirements recognize that, on the one hand, the individual interest in avoiding false stigma, in human and state law terms, is frequently enormous and has thus been recognized since ancient times[7] and is actionable "in the

[6] In the government employment line of cases, the government employer does not alter legal status, but the threat of termination acts as that "more tangible interest," *Paul*, 424 U.S. at 702, perhaps to assure that the actionable charge of misconduct be sufficiently formal and intentional, so as not to create federal causes of action for mere careless or random words uttered by officials. While the *Paul* Court did not specifically identify this rationale when it stated that termination of employment in conjunction with defamation suffices for a due process claim, such reasoning would be consistent with its later cases.

[7] "A good name is better than precious ointment." Ecclesiastes, VII, 1 (circa 350 B.C.); "Who steals my purse steals trash; 'tis something,

courts of virtually every State," *Paul*, 424 U.S. at 697; on the other hand, in constitutional terms, the Court has refused to allow "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' [to establish] a violation of the Fourteenth Amendment," *id.* at 699, converting the Due Process Clause into a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701.

Here, the Second Circuit applied *Paul* and its predecessors and progeny by requiring that the State action complained of (1) infringe an interest in reputation by publishing a falsely stigmatizing statement, *i.e.*, that registrants are currently dangerous; and (2) do so as part of an integrated statutory scheme that alters registrants' legal status under state law through significant registration obligations, dereliction of which is punishable as a felony, which force registrants to surrender to the State current personal information, including personal description, address, mental health treatment and interstate travel plans and to submit to on-demand photographing. This regime is the necessary predicate to the State's defamation, which cannot be accomplished without up-to-date images and personal registrant information since the whole point of Megan's law notification is to enable the public to readily identify former sex offenders by telling it what they look like and where they reside. These legal obligations distinguish this scheme from *Paul*, where Mr. Davis was not required to say or do anything, although his reputation was arguably damaged in the community. As the Second Circuit noted, the respondent's claim—seeking

nothing; "Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed." William Shakespeare, OTHELLO, III, iii, 155 (1604); Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 194 (1890) (citing a 1356 case recognizing slander as a cause of action).

injunctive relief against a stigmatizing public notification scheme founded on the State's unique capacity to impose a leviathan of onerous and humiliating conditions is aimed at the State in its core "governmental" capacity, *Daniels*, 474 U.S. at 332, and thus appropriately draws upon the "heavy artillery" of the United States Constitution. *Dep't of Public Safety*, 271 F.3d at 59.

Connecticut and the United States argue that this case, like *Paul*, involves an allegation of mere stigma, with no "plus." This claim is founded on a basic mischaracterization of Connecticut's integrated statutory scheme and respondent's cause of action. The United States describes the "'state action complained of' in this case" as "facilitating public awareness of respondent's inclusion in the State's sex offender registry, and the alleged stigma resulting there from." U.S. Br. at 14. In actuality, the state action complained of is Connecticut's use of personal information and images it forcibly extracts from registrants, under penalty of five years in prison per violation if they fail to submit, in order to defame them. Conspicuously absent from the government's characterization of the "state action complained of" is any mention of the fact that the sex offender registry, unlike the arrest record in *Paul*, is not a pre-existing public record the government generates in the course of its traditional public functions (and temporally and functionally unrelated to the alleged defamation), like making arrests, but an extraordinary data base compiled solely by virtue of government compulsion uniquely on sex offenders to continually surrender their persons and personal information so the government can track them and encourage the public to ostracize them.

The District Court's selection of a narrow *remedy* that permits registration to continue for exclusive law enforcement purposes so long as publication and defamation cease, *see* U.S. Br. at 14 n. 5, is fully consistent with this Court's

recognition that the redress for a "stigma plus" claim is essentially a "name clearing hearing," *Roth*, 408 U.S. at 573 n. 12; *Dep't of Public Safety*, 271 F.3d at 59, and not a remedy for the state action constituting the "plus." The government does not dispute this, but pretends that so long as categorical registration remains permissible, there can be no objection to publication of the registry. This logic contradicts the Court's government defamation cases and ignores the fact that confidential law enforcement use of the registry is not defamatory because defamation requires publication. In *Constantineau*, for example, the Court assumed that no due process hearing would be required before the plaintiff could be prohibited from receiving liquor within city limits for one year on an *ex parte* basis, 400 U.S. at 509 ("[t]he police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment"), and the plaintiff did not seek a remedy for the State's prohibition, but only for its concomitant defamation. *See Constantineau v. Grager*, 302 F. Supp. 861, 865 (E.D. Wisc.1969) (Duffy, J., dissenting); *Constantineau*, 400 U.S. at 435. The fact that a prohibition on liquor could continue apace did not mean that the government could tell the world about it without notice and hearing.

While this case does not present the question whether registration *alone*, without publication, infringes a liberty interest requiring notice and hearing, it is clear that respondent has included the registration duties as an essential component of his "stigma plus" cause of action and is thus complaining, not only that the government is unfairly tarnishing his reputation, but is using its awesome power to prosecute and punish him to enlist him in that venture. As the District Court found:

> The CT-SORA . . . requires nondangerous registrants to repeatedly take specific actions to facilitate the government's ongoing defamatory communications.

> This is no small matter. . . . [R]egistration under a sex offender statute is "a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government."

Doe v. Lee, 132 F. Supp. 2d 57, 65-66 (D. Conn. 2001) (quoting *Doe v. Attorney General*, 715 N.E.2d at 43).

Connecticut and its *amici* further misread both the opinion below and this Court's cases to argue that the holding in this case overreaches the limits of due process protections by too broadly interpreting the "plus" requirement. First, Connecticut and the United States parse the Second Circuit opinion, claiming its statement that the "plus factor" must amount to "an indicium of material government involvement unique to the government's public role that distinguishes [a plaintiff's] claim from a traditional state-law defamation suit" collapses the "under color of law" requirement into the requirement that stigma be accompanied by a "plus factor," and further claiming that the Second Circuit's holding would have permitted the plaintiff in *Paul* to maintain a due process claim, Pet. Br. at 34; *see also* U.S. Br. at 16. This startling argument ignores that the opinion makes abundantly clear that the "indicium of material government involvement" must be an actual alteration of *legal* status, something only the government can do and that can never equate to the defamatory utterance alone, 271 F.3d at 56, and that the state action must go "beyond the mere presence of a state defendant." 271 F.3d at 54. The registration duties were absent in *Paul*.

Second, the State claims that *Paul's* "plus" requirement is a requirement that the defamatory speech "cause" the alteration of a right or status under state law. *See* Pet. Br. at 37 (the deprivation of a protected right or status must be "caused by

the alleged defamatory act"); U.S. Br. at 15 (notification and stigma have not resulted in loss of government employment, tax exemption or right to buy liquor). According to the government, here, the defamation does not "cause" the registration duties, but rather, the registration comes before and enables the defamation. Finding no support in this Court's decisions, this criterion is invented by the government and is obviously wrong because defamatory speech will *never* alter one's legal status. Defamation may cause a lot of damage, such as loss of housing, future employment and personal relationships. But those are precisely the types of consequences *Seigert v. Gilley* held could *not* qualify as the "plus" because they are merely the damages caused by the defamation, not an alteration of legal status. 500 U.S. at 234 (the damage that "flows from" the defamatory act cannot be the "plus"). In short, the State misconstrues the "plus" requirement to be precisely what this Court held it is not, damages proximately caused by defamatory speech under tort principles. *See* Pet. Br. at 37 (citing tort proximate cause principles in *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978), to claim the "plus" must be the "compensable injury" "*caused*" by defamation) (emphasis supplied by petitioner)).[8]

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[8] Examination of the relevant cases demonstrates the fallacy of the governments' argument. In *Constantineau* the "state action complained of" was Wisconsin delegating to a wide class of individuals discretion to "post" a person's name in a notice prohibiting others from selling or giving her liquor within city limits for one year. The defamation implied by the posting did not "cause" the loss of the right to receive liquor. Suspension of the right to buy liquor was caused solely by the authority vested by a Wisconsin statute. Here too, the registration requirement precedes the stigma and is intimately connected with it. Similarly, in a loss of government employment situation like that described in *Roth*, the defamation occurs only when a statement alleging wrongdoing is published, yet *publication* does not "cause" the employer's decision to terminate employment. The publication may be the proximate cause of

B. SORL wrongfully damages the reputations of non-dangerous registrants by falsely implying they are dangerous.

The parties clash over the meaning of the message Connecticut conveys to the public by publishing the sex offender registry. The State focuses on the registry's component data, such as name, address, photograph, physical description and record of conviction, and says it is all true, hence, there is no false stigma. By this reasoning, one can defend the Nazis' practice of registering and labeling Jews with gold stars by observing that in fact the labeled persons were Jewish, or, forcing on Arab-Americans a personal registration regime and then establishing a Department of Homeland Security website that plasters their faces, home addresses and identifying characteristics under the banner "Registered Persons of Arab Descent," on the theory that it contains accurate information. The salient question for defamation purposes is not whether sex offenders, Jews or Arab-Americans are accurately identified as such, but what does the government and, more specifically, a law enforcement branch of government like the Connecticut State Police, mean to say by targeting them through a regime of personal monitoring, identifying them, and publishing the results?

Connecticut identifies "registered sex offenders" as dangerous persons likely to re-offend by publishing their current appearance, whereabouts and other personal matters, images and information it obtains by compulsion through an integrated statutory scheme uniquely targeting former sex offenders for governmental monitoring and community ostracism long after their sentences expire. Consequently, Megan's law publication is fundamentally unlike our common law tradition of access to judicial records of historical events adjudicated in

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failure to obtain *future* employment, but, again, as *Seigert* holds, that is not what is contemplated by the "plus."

criminal cases. Open courtrooms and judicial records do not track the whereabouts and appearance of convicted persons after they complete their sentences. They protect the accused's litigative interests and the public's interest in knowing whom their government is charging or convicting and how the government is going about its job. While "having a record" is stigmatizing because it reveals one's past crime, the government's maintenance of such a record connotes no governmental agenda beyond preservation of historical events of legal and public import. The government, like the press, is free to put extant criminal conviction records on the Internet and to enable users to access them by cataloguing them in various ways. Further, the use of modern technology to facilitate access to selected classes of traditionally public records relating to offenses of particular concern to the public, such as sex crimes, drug dealing or insider-trading does not significantly implicate governmental stigma. But when the State publishes the results of an extraordinary personal registration scheme designed to target a class of former offenders for *ongoing* governmental and community oversight by collecting and disseminating their current personal information because of the legislature's belief in their dangerousness, it cannot plausibly maintain that the public will understand that the government is agnostic on the issue of their current dangerousness. Indeed, Megan's laws cannot function on pre-existing public information precisely because their mission is not merely to provide historical conviction information, but to issue a public warning about the current whereabouts and appearance of former offenders so the public can monitor and avoid them.

"The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Restatement (Second) Torts § 563 (1976). In determining the publisher's intent and the recipient's reasonable understanding of that intent, the context and circumstances in which a communication is made are

critically important. "In determining the meaning of a communication, account is to be taken of all the circumstances under which it is made so far as they were known to the recipient." *Id.*, comment e. The government's publication of the sex offender registry means that the government believes registrants are sexually dangerous and therefore unsuitable for the social, economic and personal relationships they may be able to forge absent their constant supervision and exposure thorough public notification. This is the most reasonable meaning of Megan's law notification because of the unique legal, social and historical circumstances attending Megan's laws.

The purpose of Megan's laws, named after a child murdered by a convicted sex offender living in the community, is to target former sex offenders for community warning because the government believes they are dangerous. The public will reasonably understand that government publication of the sex offender registry is intended to fulfill that mission by targeting those former offenders people must avoid to remain safe. The United States has recently represented to this Court that the purpose of publication of a sex offender registry, which, like Connecticut's, is founded solely on prior convictions and not a current assessment of dangerousness, is "to help members of the public protect themselves and their children from falling prey to sex offenders." U.S. Br., *Godfrey v. Doe*, No. 01-729, at 5. The Wetterling Act, the legal and political impetus for Connecticut's and all other current Megan's laws, is based on a Congressional determination "that community notification was essential to allow members of the public to protect themselves from future crimes by convicted sex offenders." *Id.* The United States has cited the Congressional Record's references to "little Megan" who "would be alive today" had a Megan's law been in effect and legislators' assessments that public notification warns of the "threat . . . looming in [the] community." *Id.* n. 7. "The law allows citizens . . . to protect

themselves and their children from falling prey to future criminal acts, by increasing their alertness and modifying their behavior." *Id.* at 18.

As discussed, public notification is not the equivalent of a freedom of information law, but rather a critical ingredient of a government-imposed crime prevention program designed to deprive former sex offenders, uniquely, of anonymity because of the legislature's belief that they are too dangerous "to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), like everybody else. Through its public laws and the government's publication of information pertaining to persons currently "registered," the public understands the cost the government assesses against registrants in order to make the registry available to the public. The public knows that registrants are required, upon penalty of imprisonment, to sit in police stations for photographs on demand, to divulge their psychiatric treatment histories, their interstate travel plans, their home and work addresses and their personal identifying characteristics, such as scars and tattoos. These requirements are not conditions of their voluntary participation in a regulated profession or activity, but are uniquely imposed on former sex offenders as a condition of being permitted simply to remain in society. Submission to such requirements "asserts a relationship between government and the individual that is in principle quite alien to our traditions." *Doe v. Attorney General*, 686 N.E.2d at 1015-16 (Fried, J., concurring).[9] The public will

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[9] Some states have general "felon registration laws," intended to enhance law enforcement, but which do not permit public disclosure of registrant information. Such laws typically require one-time registration only, sometimes imposing a further reporting duty only in the event of a change in address, contain provisions prohibiting public disclosure and frequently exempt felons whose civil rights have been restored. *See, e.g.*, Ala. Code § 13A-11-181-185; Fla. Stat. Ch. 775.13; Miss. Code Ann. § 97-35-27; Nev. Rev. Stat. 179C.100-170. Thus, while imposing a modest

reasonably conclude that law enforcement agencies go so far as to abridge registrants' civil liberties to extract the information the public needs to arm itself against them, an extraordinary pre-emptive approach to crime that has never been applied in this country to ordinary citizens, because of the legislature's belief in their present dangerousness.

The public spectacle of labeling former sex offenders' images with the names of their crimes is a sanction historically reserved to punish criminals by exposing them to infamy, loss of reputation and community ostracism, often because of the State's belief in their dangerousness. *See* Brief of PDS as *Amicus Curiae* in *Godfrey v. Doe*, No. 01-729, at 20-24. Whether the public understands the vivid display of persons labeled "registered sex offenders" to be the equivalent of a scarlet letter, or, as the United States has suggested, a "most wanted poster" for criminals or terrorists at large, *see* U.S. Br. in *Godfrey v. Doe*, No. 01-729, at 19, the implication of dangerousness is clear.

Connecticut's release of registrants' images and private information, including home addresses and identifying physical characteristics subjects registrants to a significant loss of privacy and a substantial likelihood of harassment and vigilantism. *See Amicus* Br. of N.J. Public Defender in *Godfrey v. Doe*, No. 01-729. Such unprecedented treatment of citizens represents a glaring deviation from American norms of privacy and decency. As the United States recognizes, *see* U.S. Br. at 23 n. 8, our Constitution and common and statutory laws attest to the high value Americans place on the privacy interests SORL invades.[10] The public will

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restriction on liberty to aid law enforcement, they do not publicly brand registrants with a badge of infamy.

[10] *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (Due Process Clause protects "the individual interest in avoiding disclosure of personal matters"); *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999) (privacy interest in home address); *A.A. v. New Jersey*, 176 F. Supp.2d 274, 300

understand that its government does not lightly deprive registrants of a basic human dignity, "the right to be let alone," which Justice Brandeis characterized as the "the most comprehensive of rights and the right most valued by civilized men," *Olmstead*, 277 U.S. at 478 (dissenting opinion), but only because it believes registrants are so uniquely dangerous that they must be rendered locatable and identifiable at all times.[11]

(D.N.J. 2001) (enjoining State, on federal constitutional privacy grounds, from placing registrants' home addresses on the Internet for indiscriminate public access); *Doe v. Poritz*, 662 A.2d 367, 408-09 (N.J. 1995) (New Jersey and Federal Constitutions protect privacy interest in home address because disclosure of sex registrants' addresses is made in context with substantial likelihood for unwanted intrusions); *Doe v. Attorney General*, 686 N.E.2d at 1012-13 (privacy interest under Massachusetts Constitution); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998) (police officers had federal constitutional privacy interest in the nondisclosure of their home addresses as chance of retaliation and physical violence by private citizens was substantial). "Most courts considering the question . . . agree that privacy of personal matters is a protected interest." *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (collecting cases); Conn. Gen. Stat. § 1-17a (prohibiting state agencies from disclosing citizens' photographs without consent); 18 U.S.C. §§ 2721-2725 (Driver's Privacy Protection Act of 1994, limiting states' ability to disclose personal information collected by motor vehicle departments, including all information that may identify the person, e.g. photograph, name and address); 5 U.S.C. § 552a (Federal Privacy Act); *United States Dep't of Defense v. FLRA*, 510 U.S. 487, 501 (1994) (FOIA does not permit disclosure of home addresses; "[w]e are reluctant to disparage the privacy of the home, which is accorded special considerations in our Constitution, laws, and traditions. . . . [I]t is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant").

[11] Disclosure of registrants' exact addresses and personal identifying characteristics (*e.g.* scars and tattoos) is particularly disturbing since such information is not normally in the public domain. Indeed, many people make a point of withholding their home addresses from telephone listings and the like. Placing such personal matters alongside registrants' images, their criminal convictions and the State's stigmatizing label of "registered

Because of the nature of the Megan's law mission, it is hard to imagine how even the best-intentioned law enforcement administrators could accomplish community notification without saying registrants are dangerous. Sex offender websites are, in fact, replete with alarming statements that caution people to avoid registrants. In addition to Internet notification, Connecticut, the District of Columbia and other states also permit "active" notification, whereby a police officer may go door-to-door announcing a former sex offender's arrival in the neighborhood, his duty to register, his criminal history and known characteristics. No matter how carefully officers are trained, such targeted disclosure of normally private information can be characterized only as announcing a clear and present danger.

While the Court apparently does not have access to the precise contents of Connecticut's enjoined website, the District of Columbia website, located at http://www.mpdc.dc.gov/serv/sor/sor.shtm, is illustrative. The website, as in Connecticut, is maintained by the police department. It not only lists registrants' information alongside their photograph, but requires nearly all registrants to hold a sign in front of

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sex offender" is a matter of grave concern because the government is not only violating registrants' privacy, but collating information in an explosive package that makes already unpopular persons sitting ducks for all manner of victimization. Thus, the New Jersey Supreme Court has recognized that "the question of whether an individual has a privacy interest in his or her *bare* address does not fully frame the issue. The more meaningful question is whether inclusion of the address in the context of the particular requested record raises significant privacy concerns, for example because the inclusion of the address can invite unsolicited contact or intrusion based on the additional revealed information." *Poritz*, 662 A.2d at 409 (internal quotation omitted). Connecticut recognizes the importance of shielding the residential addresses of federal and state employees who are in the public eye. *See* Conn. Gen. Stat. § 1-217 (CT-FOIA prohibits disclosure of residential addresses of judges, prosecutors, police officers, public defenders and like persons).

their chest with the label "Sex Offender." The site notes that the registry is meant to "enable [the reader] to make appropriate decisions about whether [the reader] want[s] to associate with them or entrust [his] children to them." The "Frequently Asked Questions" section of the site includes the questions "Why is the sex offender moving into my area?" and "If the sex offender is so dangerous, why are you letting him/her out in the first place?" Metropolitan Police alert the reader that the information should be "used responsibly to promote public safety," and makes the following suggestions to parents about what to do "now that I know a sex offender lives in my neighborhood":

> If you decide that you do not want your children to associate with someone in this registry, you can tell your children that this person has hurt someone before. Explain to them that they must stay away from this individual. Review safety tips with your children and be aware of common lures. Remember, the purpose of community notification is to reduce the chance of future victimization of persons *by this offender*. Knowledge of the sex offender should assist you and your family in *avoiding the sex offender and becoming a victim.*

http://www.mpdc.dc.gov/serv/sor/faqs.shtm (emphasis added). In response to the question "What do I tell my children about this offender?" the site suggests that parents "avoid scary details about the offense committed by the sex offender" but that they "may want to advise" children to "call 911 immediately if this person approaches [them]." *Id.* In a similar vein, Connecticut law mandates the Office of Adult Probation to develop community programs to teach communities where a released offender "will be residing" "how to better protect themselves from sexual abuse and sexual assault." Conn. Gen. Stat. § 54-261(a)(b). The program should include provision of information about "the enforcement of requirements concerning the registration and supervision of sexual offenders," §54-261(b), and specific crime prevention techniques, such as

the creation of "a network of 'Safe Houses' for neighborhood children to use when they seek shelter." § 54-261(c)(4). While such programs are laudable and welcome in every community, the fact that Connecticut law mandates them only in conjunction with an identified offender's arrival in the neighborhood contributes to the message that such persons are dangerous.[12]

Public notification that a person is presently likely to sexually offend is about as defamatory a publication as one can imagine. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Rest. (Second) of Torts § 559. This classic description of defamation encapsulates the purpose and effect of Megan's laws. Not surprisingly, then, lower courts considering offense-based Megan's laws like Connecticut's have held that publication of the registry is stigmatizing because it communicates the State's current assessment of a likelihood of continuing criminality, not merely a past record.[13] The government's official public branding of registrants as "registered sex offenders" is exactly the type of "badge of infamy" to which *Constantineau* referred. 400 U.S. at 437. If being labeled a problem drinker is stigmatizing, being labeled a dangerous sex offender is devastatingly so.

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[12]This Court has made clear that a statement may be stigmatizing even if not explicit and even if every reader/hearer might not interpret the statement in the same way: "'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of the person. The label is a degrading one." *Constantineau*, 400 U.S. at 437.

[13] *See, e.g., Fullmer v. Michigan Dep't of State Police*, 207 F. Supp. 2d at 659; *Williams*, 167 F.Supp. 2d at 51; *Bani*, 36 P.3d at 1264.

C. Due process requires a pre-deprivation hearing on the question of dangerousness.

Having established a "stigma plus" liberty interest, Connecticut registrants are entitled to a pre-publication hearing on whether they pose a significant threat to public safety by virtue of their current dangerousness.[14] Many states already successfully administer such offender-based systems, including New Jersey, author of the original Megan's law. Our legal system is founded on the premise that current dangerousness is not merely a matter of conjecture, but an adjudicative fact capable of sufficiently reliable determination to warrant grave legal consequences, such as pre-trial detention, civil commitment, termination of parental rights, or even the death penalty. The type of hearing that must be afforded, the allocation of burdens, the use of presumptions based on prior convictions, or the added fiscal cost to the State are all questions properly addressed under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The criminal trial itself is not sufficient process, unless public notification is treated as part of the criminal punishment, a position Connecticut has not taken because it wishes to apply SORL retroactively. The criminal trial is not sufficient process because it does not address current

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[14] *See Paul*, 424 U.S. at 711 ("we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter [a legally] protected status"); *Goss*, 419 U.S. at 582; *Roth*, 408 U.S. at 537 n.12; *Constantineau*, 400 U.S. at 437; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (requiring adversarial hearing to determine whether organizations may be designated "communist": "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society"); *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 205-09 (D.C. Cir. 2001) (pre-deprivation hearing to determine accuracy of classification as "terrorist" organization).

dangerousness, but only whether certain events occurred in the past. In many cases, the judgment itself will be highly probative of current dangerousness, but the State has never suggested, nor could it plausibly maintain, that all registrants are currently dangerous by virtue of their qualifying conviction. Since due process requires "the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), "on the fundamental facts," *McGrath*, 341 U.S. at 162 (Frankfurter, J., concurring) (quoting *Southern R. Co. v. Commonwealth of Virginia ex rel. Shirley*, 290 U.S. 190, 199 (1933)), the required hearing must address current dangerousness, an inquiry Connecticut's current scheme forbids.

II. THE ABSENCE OF A CRITERION OF CURRENT DANGEROUSNESS MAKES SORL CONSTITUTIONALLY UNACCEPTABLE AS A CIVIL REGULATORY SCHEME.

Connecticut's offense-based Megan's law and Alaska's similar statute (under review in *Godfrey v. Doe*, No. 01-729) are representative of a legislative response to the problem of sex crimes which turns on its head the centuries-old prescription of Anglo-American criminal law that a prisoner must be unleashed from the grip of the State once he has completed his sentence and paid his debt to society. Never before in our history has the State imposed a "regulatory" scheme, founded solely on a prior conviction, that creates a second-class caste of American citizen for all purposes in all life-pursuits, frequently lasting until death. As demonstrated, this case is not about the free flow of criminal history information through advanced technological means, but about the State's authority to permanently degrade a person's legal status so he is no longer just a person, like millions of other Americans, with a criminal past which may or may not be forgiven by his family, neighbors or peers following his legal

repayment of his debt to society, but is labeled a "registered sex offender," a legal leper continually monitored by the State like a probationer or parolee and branded with his crime so that, no matter what he does or where he goes, he can never present himself without simultaneous disclosure of the State's continuing opprobrium. In *Godfrey v. Doe*, PDS as *amicus curiae* argued that such a regime, when based solely on past conviction and not on a current assessment of dangerousness, has been known only as criminal punishment. For that reason, we argued that Alaska's similar scheme cannot be applied to offenses committed before its enactment consistently with the Ex Post Facto Clause. As Justice Kennedy points out in his concurring opinion in *Kansas v. Hendricks*, 521 U.S. 346 (1997), an essentially punitive scheme is no more constitutionally acceptable under the Due Process Clause as a "civil regulatory" scheme in its prospective applications than it is under the Ex Post Facto Clause in its retroactive applications. *Id.* at 373 ("civil" laws may not impose supplementary punishments for sex offenders leniently treated "on the criminal side" "whether the civil confinement statute is put on the books before or after the offense").

Justice Kennedy has "caution[ed] against [the] dangers inherent when a civil confinement law is used in conjunction with the criminal process," *id.* at 372, in the context of sexually violent predator commitment. In a similar vein, former Massachusetts Justice Fried has observed that: "The notification and registration provisions of [a Megan's law] . . . , because they follow on and are closely associated with criminal condemnation raise in an urgent way the constitutional imperative that the distinctiveness of punishment and the stringently limited regime surrounding its imposition not be elided under a loose and casual invocation of the concept of regulation." *Doe v. Attorney General*, 686 N.E.2d at 1016 (concurring opinion). Persons under sentence are required to submit to reporting and surveillance by the State, while the

rest of us are not, precisely because their liberty is conditional. It follows then that unconditionally discharged former offenders cannot be subjected to significant reporting and surveillance of the sort required by SORL absent some additional justification beyond their prior conviction, such as current dangerousness.

If the State needs no special justification here, then it may similarly demand registration and public notification of homosexuals, persons infected with HIV or any other group that does not enjoy heightened equal protection scrutiny and may be of particular concern to political majorities around the country.

> [T]o keep the concept of regulation in its place, it may be said that, while activities, professions, or relationships may be regulated, we do not have a general regime regulating adult competent persons as such. . . . Persons are left to choose freely and if they make the wrong choices they are subject to retrospective condemnation and punishment. This is not merely a conceptual difference. It is a profound expression of our Constitution's conception of human nature and of the relation of individuals to the State.

Id. at 1015. To be sure, this Court has approved regulation of persons based on dangerousness in a variety of contexts, but each has been marked by a degree of urgency entirely absent from Connecticut's categorical scheme, such as during war [15] or a plague,[16] or to detain demonstrably dangerous persons

[15] *See, e.g., Ludecke v. Watkins*, 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in time of war); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding authority of state to exclude persons of Japanese descent from certain locations during war with Japan).

[16] *E.g., Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding compulsory small pox vaccine); *Compagnie v. State Bd. of Health, Louisiana*, 186 U.S. 380 (1902) (upholding state's authority to quarantine).

pending trial on a serious crime,[17] or to civilly commit those who are dangerous and mentally ill.[18]

Megan's laws are different in degree, not kind, from sexually violent predator commitment schemes. *See Doe v. Attorney General*, 686 N.E.2d at 1015 (Fried, J., concurring). Both types of laws restrict the liberties of former sex offenders even after they have completed their sentences because of the fear that they will re-offend. Admittedly, confinement in a prison-like setting, such as in *Hendricks* and *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867 (2002), represents a more concrete and dramatic case of liberty deprivation. On the other hand, sexually violent predators, like other civil committees, are entitled to treatment, may hope for recovery, and possess a judicially enforceable right to end their confinement and re-integrate into the community (at least before Megan's laws) once they are no longer dangerous or mentally ill. As to those for whom freedom will remain theoretical, the substantive and procedural limitations on the State's authority to civilly commit them is proportionate to the restrictions imposed and the extreme nature of the sanction proportionate to the community's need to be safe from them. The Court recognized these principles in *Hendricks* and *Crane* by demanding substantive criteria for civil commitment—dangerousness, mental abnormality and a substantial lack of impulse control—that brought the state regulatory scheme "within th[e] pattern and tradition of civil confinement," *Hendricks*, 521 U.S. at 372 (Kennedy, J. concurring), and assured that "civil" law did not displace criminal law by imposing punitive restrictions on liberty perceived to be desirable, but unauthorized by the criminal judgment. *Crane*, 122 S. Ct. at 870. *See also Zadvydas v. Davis*, 533 U.S. 678, 691 (2001). By lengthening the leash

[17] *United States v. Salerno*, 481 U.S. 739 (1987).

[18] *Foucha v. Louisiana*, 504 U.S. 71 (1992).

for registered sex offenders, the State need not be held to a standard of proving, in addition to dangerousness, "some other special circumstance, such as mental illness," *id.*, but a dangerousness inquiry cannot be dispensed with altogether because the State still imposes a significant restriction on liberty unauthorized by the original sentence.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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